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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DON A. ERNST
TERRY J. KILPATRICK
ERNST & MATTISON, APC
1020 Palm Street
San Luis Obispo, CA 93401
(805) 541-0300

JOHN J. BURSCH
Counsel of Record
MATTHEW T. NELSON
AARON D. LINDSTROM
JULIE LAM
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
jbursch@wnj.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition-plan regulations, 28 C.F.R. § 35.150(d), are enforceable by private right of action.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Lonberg respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 571 F.3d 846. App. 1a. The order denying the petition for rehearing en banc is unreported. *Id.* 59a. The orders of the United States District Court for the Central District of California are also unreported. *Id.* 15a; *id.* 17a; *id.* 33a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343 over petitioner's federal civil-rights claims, and the district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over petitioner's state-law claims. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, and under 28 U.S.C. § 1292(a) to review its entry of a permanent injunction. The court of appeals filed its opinion on June 26, 2009, and it denied, on January 15, 2010, petitioner's timely filed petition for rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (hereinafter "§ 12132"), which prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. In its entirety, § 12132 states:

> § 12132. Discrimination. Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

This case also involves Section 203 of the ADA, 42 U.S.C. § 12133 (hereinafter "§ 12133"), which created a private cause of action to enforce the ADA by incorporating the remedies, procedures, and rights of 29 U.S.C. § 794a. In its entirety, § 12133 states:

> § 12133. Enforcement. The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Finally, this case involves Section 204 of the ADA, 42 U.S.C. § 12134 (hereinafter "§ 12134"), which directed the Attorney General to promulgate regulations consistent with the transition plan regulations for the Rehabilitation Act, 28 C.F.R. § 39.150(d). In pertinent part, § 12134 states:

§ 12134. Regulations. (a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. . . . (b) Relation to other regulations. . . . With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

INTRODUCTION

This case involves a recognized and mature circuit split over an issue of substantial and recurring importance—whether the ADA's transition-plan regulation, 28 C.F.R. § 35.150(d), is enforceable by private cause of action. The Ninth Circuit panel below agreed with the First and Sixth Circuits that § 35.150(d) is not privately enforceable. App. 6a (citing *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006)). In so holding, the panel reversed the district-court decision, which had followed the Tenth Circuit in concluding that § 35.150(d) is privately enforceable. App. 6a (citing *Chaffin* v. *Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003)). The importance of the question presented to advancing the goals of the ADA, and the uncertainty in the law that the split of authority creates, counsel strongly in favor of granting the petition.

When Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Here, it is undisputed that Congress created a private right of action to enforce the ADA. 42 U.S.C. § 12133. So the only question is whether § 35.150(d)'s transition-plan requirements implement the ADA. They plainly do. In enacting the ADA, Congress expressly required the Attorney General to adopt transition-plan requirements similar to those already in place for the Rehabilitation Act. 42 U.S.C. § 12134. And that is precisely what § 35.150(d) accomplishes. Moreover, as explained further below, the transition-plan requirements are critical to implementing the ADA. Without comprehensive transition plans that identify barriers to access, public entities cannot proactively resolve accessibility issues. The natural result is that millions of people with disabilities will be unable to participate in public services, programs, and activities unless they file suit, the very scenario that Congress sought to prevent when it enacted §§ 12132, 12133, and 12134. Accordingly, this Court should adopt the Tenth Circuit's holding that § 35.150(d) is privately enforceable and should reject the contrary holdings of the First, Sixth, and Ninth Circuits.

The circuit split over the issue of § 35.150(d)'s private enforceability engenders uncertainty for public entities and results in differing treatment of claimants depending on the circuit where they live. In addition, the issue presented is one of immense practical importance. As this Court noted in *Tennessee* v. *Lane*, 541 U.S. 509, 511 (2004), the sheer volume of passive discrimination against persons with disabilities "was an appropriate subject for prophylactic legislation." And, as catalogued in the *amici curiae* briefing below, there are numerous lawsuits currently pending against public entities just on the narrow issue of sidewalk accessibility, lawsuits that would be wholly unnecessary if cities created and implemented transition plans as the law requires. The Ninth Circuit's decision adversely affects the rights and lives of many and is directly contradicted by the plain language of the ADA. This Court should grant the petition and reverse.

STATEMENT

A. The ADA's statutory and regulatory scheme

Congress enacted the ADA in 1990 to address the "serious and pervasive" isolation of and discrimination against millions of Americans with a physical or mental disability. 42 U.S.C. § 12101(a). Congress specifically tailored Title II of the ADA to address "passive" or "exclusionary" discrimination by local and state governments, particularly those governments' failure to modify structural barriers to disability inclusion. See HR Rep No. 101-485(II), 101st Cong., 2d Sess. 95-96 (1990), reprinted in 1990 USCCAN 378.

Section 12132 prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. 42 U.S.C. § 12132. As the Ninth Circuit recognized below, the prohibition "is universally understood as a requirement to provide 'meaningful access.'" App. 10a.

Due to the passive discrimination that Title II is designed to remedy, § 12133 expressly authorizes a private right of action to "[a]ny person alleging discrimination on the basis of disability in violation of section 12132. . . ." Important for purposes of Mr. Lonberg's suit here, available remedies include injunctive relief. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002).

Transition-plan requirements have their genesis in § 12134, which required the Attorney General to "promulgate regulations" by July 26, 1991, that were consistent with the Rehabilitation Act regulations already in effect for federally conducted activities. 42 U.S.C. § 12134(a), (b) (citing 28 C.F.R. § 39.101 *et* *seq.*). Among the regulations Congress specifically directed the Attorney General to implement was a regulation that requires public entities to develop transition plans that identify physical obstacles limiting access to the entities' programs and activities, and that explain how and when those obstacles will be removed. See 28 C.F.R. § 39.150(d). Accordingly, the regulations the Attorney General promulgated require certain public entities (i.e., those entities that would need to make "structural changes to facilities" to meet ADA standards) to "develop . . . a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d). At a minimum, such a plan must identify physical obstacles that limit accessibility; describe the methods that will be used to make facilities accessible; create an implementation schedule; and indicate the government official responsible for plan implementation. 28 C.F.R. § 35.150(d)(3).

The Disability Rights Section of the U.S. Department of Justice's Civil Rights Division has identified failure to develop transition plans as one of the ADA's most "common problems." The ADA and City Governments: Common Problems (Oct. 9, 2008), available at http://www.ada.gov/comprob.htm [hereinafter "Common Problems"]. As the Department of Justice observes, when transition plans are not developed, "city governments are ill-equipped to implement accessibility changes required by the ADA," and the city "can only react to problems rather than anticipate and correct them in advance." *Id.* The necessary result is that "people with disabilities cannot participate in or benefit from the city's services, programs, and activities." *Id.* This is the exact harm that Congress sought to prevent when it enacted § 12132 and made it privately enforceable.

B. John Lonberg is being denied access to streets and sidewalks.

Petitioner John Lonberg is a resident of the City of Riverside, California. He is a man with paraplegia who uses a wheelchair for mobility. Mr. Lonberg uses the City's public streets and sidewalks on a regular and ongoing basis to, among other things, take his grandchildren to sporting events, patrol the streets as a Handicap Parking Patrol Officer, attend church, accompany his grandchildren to school, and go to Kaiser Hospital.

The City of Riverside is a municipal corporation and charter city of the State of California that is subject to the ADA. By federal mandate, the City was supposed to have a transition plan in place by July 26, 1992, 28 C.F.R. § 35.150(d)(1), and was required to bring its facilities into ADA compliance no later than January 26, 1995, 28 C.F.R. § 35.150(c). Yet, more than 15 years later, the City acknowledges that there are still "thousands" of unlawful barriers to Mr. Lonberg's mobility throughout the City. After examining the evidence, the district court concluded that the City "has engaged in *a pervasive pattern of violating Title II* of the ADA and the regulations related thereto." App. 30a (emphasis added).

The physical obstacles that Mr. Lonberg encounters within the City prevent him from using certain City streets and sidewalks, or require him to risk his health and safety by going around or through obstacles. The district court concluded that the challenges Mr. Lonberg faces due to these obstacles "cause him irreparable harm." App. 20a.

C. Petitioner's suit and the District Court's grant of an injunction against the City

Mr. Lonberg initiated his lawsuit in 1997. The district court divided the litigation into three phases. At issue in this appeal is phase one, concerning Mr. Lonberg's claim that the City lacked an adequate transition plan as 28 C.F.R. § 35.150(d) requires.

On June 12, 2000, the district court first concluded, as a matter of law, that the City lacked an adequate transition plan addressing the thousands of barriers to accessibility within the City. The City amended its plans in November 2000 and again in July 2001, but the district court held that these plans likewise failed to meet the requirements of ADA Title II and its accompanying regulations. In so ruling, the district court noted that the City had not raised the issue whether § 35.150(d) is enforceable by a private citizen by means of a federal lawsuit. But the court noted that several district courts had held that such a private right of action exists, at least where the plaintiff seeks injunctive relief. App. 43a (citing *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 539 (W.D. Ark. 1998); *Schonfeld* v. *City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997); *McCready* v. *Michigan State Bar*, 881 F. Supp. 300 (W.D. Mich. 1995)).

On March 21, 2006, the district court entered a permanent injunction against the City, requiring it to prepare a transition plan that complies with the ADA and 28 C.F.R. § 35.150. App. 15a. The City then moved for a new trial, arguing for the very first time—after a decade of litigation--that Mr. Lonberg did not have a right to privately enforce § 35.150(d). The district court denied the City's motion on the merits, reaching the same conclusion as the Tenth

Circuit's decision in *Chaffin* v. *Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2002), that § 35.150(d) is privately enforceable.

D. The Ninth Circuit's decision

The City appealed, and a divided panel of the Ninth Circuit reversed, holding that § 35.150(d) does not create a private right of action. (The dissenting judge would have affirmed based on waiver. App. 13a.) The panel majority, acknowledging that other "circuits have split" on the issue, App. 6a, declined to follow the Tenth Circuit's lead in *Chaffin*, choosing instead to follow the Sixth and First Circuit decisions in *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006). In so ruling, the majority failed entirely to analyze either the ADA provision directing the Attorney General to promulgate a transition-plan regulation, 42 U.S.C. § 12134, or the provision creating a private cause of action to enforce the ADA, 42 U.S.C. § 12133.

Mr. Lonberg petitioned for rehearing en banc, and on July 17, 2009, the panel unanimously ordered the City to file a response. App. 58a. On January 15, 2010, the panel majority voted to deny the petition, with one judge recommending that the petition be granted. App. 59a. The petition for rehearing en banc also received a split vote but failed to garner the support of a majority of the nonrecused, active judges of the Ninth Circuit. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring and important issue whether a person with a disability has a private right of action to enforce the ADA's transition plan regulation, 28 C.F.R. § 31.150. As a result of the panel majority's ruling below, millions of individuals with a disability who live in or visit the Ninth Circuit (or the Sixth and First Circuits that the panel majority followed), will inevitably be barred from participating in or benefiting from city services, programs, and activities, the very type of passive discrimination that Congress sought to remedy in enacting the ADA.

The Ninth Circuit's decision is also inconsistent with the plain text of §§ 12133 and 12134. Even though Congress identified a specific transition-plan regulation as necessary to implement the ADA (§ 12134), and expressly created a private right to enforce the ADA (§ 12133), the panel majority failed to address either of these sections in concluding that the regulation could not be enforced by private action. That conclusion was error.

Finally, the Ninth Circuit's decision conflicts with this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134, *and* a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Because Congress intended to provide a private right of action to enforce the ADA transition-plan regulation, such regulation is privately enforceable under *Sandoval.*

I. The Ninth Circuit's decision furthers a split among the federal circuits on an issue of recurring and substantial importance.

The Ninth Circuit recognized its decision furthered a clear circuit split as to whether § 35.150(d) creates a private right of action. App. 6a. The Ninth Circuit aligned itself with the Sixth Circuit in *Ability Center*, and the First Circuit in *Iverson.* In so ruling, the Ninth Circuit reversed the district court, which had reached the same conclusion as the Tenth Circuit in *Chaffin.*

The Tenth Circuit's opinion in *Chaffin* correctly rejects the panel majority's conclusion here that § 35.150(d) somehow creates a new right that cannot be found in Title II. In the Tenth Circuit's view, the regulation "simply provide[s] the details necessary to implement the statutory right created by [§ 12132] of the ADA." 348 F.3d at 858. This conclusion is consistent with the federal government's, view that the "common problem" of a city's failure to prepare a transition plan leads to the denial of city services, programs, and activities to individuals with disabilities, the very problem that Congress tried to correct by enacting § 12132. Common Problems, *supra.*

The importance of the issue presented and the millions of individuals it affects counsel strongly in favor of this Court's resolution of the split in authority. In circuits such as the First, Sixth, and Ninth, that have held there is no private right of action to enforce § 35.150(d), an apparent lack of federal resources to enforce the regulation will allow cities and other local governments to ignore their duty to prevent discrimination on the basis of disability. That is how the City of Riverside has reached the year 2010, some 15 *years* after it was supposed to be ADA compliant, with thousands upon thousands of physical barriers to access still in place. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari now to resolve the conflict and ensure that the ADA is uniformly applied throughout the country.

II. The Ninth Circuit's decision contravenes the text of the Americans with Disabilities Act and this Court's decision in *Sandoval*.

Congress clearly expressed its intent in the ADA to provide a private cause of action to enforce the transition-plan regulation. Indeed, Congress specifically authorized the regulation in the statutory text to give effect to the ADA's prohibition on discrimination against persons with a disability.

First, Congress in the ADA prohibited public entities from discriminating against persons with a disability: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. As the Ninth Circuit noted, "[t]his prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" App. 10a. The City of Riverside admits it is a public entity subject to this prohibition.

Second, Congress provided a private right of action to enforce the ADA's prohibition against discrimination. The section immediately following the prohibition, a section entitled "Enforcement," states that "[t]he remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. The Ninth Circuit agrees that "[§ 12132] is enforceable through a private right of action," App. 9a, and the City has not disputed that point.

Third, Congress directed the Attorney General to promulgate regulations to implement the ADA's discrimination prohibition, and that direction specifically called for regulations requiring transition plans. Section 12134(a) states that "the Attorney General shall promulgate regulations . . . that implement this part"—with "this part" referring to § 12131 through § 12134. Accordingly, the Attorney General promulgated in 28 C.F.R. Part 35 regulations that state that "[t]he purpose of this part"—consisting of 28 C.F.R. § 35.101 to § 35.189—"is to effectuate subtitle A of title II of the Americans with Disabilities Act"—i.e., 42 U.S.C. § 12131 through § 12134—"*which prohibits discrimination* on the basis of disability by public entities." 28 C.F.R. § 35.101 (emphasis added). This statement of purpose demonstrates the Attorney General's interpretation that *all* of the regulations in Part 35, including both its "[g]eneral prohibitions against discrimination," *id.* § 35.130, and its regulations addressing "[e]xisting facilities" and transition plans, *id.* § 35.150, effectuate the prohibition against discrimination found in 42 U.S.C. § 12132. See *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001) ("[R]egulations, if valid and reasonable, authoritatively construe the statute itself." (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984))). In other words, the Attorney General promulgated these regulations under § 12132, and that interpretation of the ADA, as reflected in 28 C.F.R. § 35.101, is entitled to *Chevron* deference.

Furthermore, Congress went so far as to specify the content of those regulations: "with respect to 'program accessibility, existing facilities' . . . , such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b). By referring to 28 C.F.R. Part 39, which includes regulations promulgated under the Rehabilitation Act, Congress thus purposely referred to 28 C.F.R. § 39.150, which (as echoed in the text of § 12134(b)) is entitled "Program accessibility: Existing facilities." And as the following chart shows, the Attorney General followed Congress's express directive by adopting in § 35.150(d) a regulation that was consistent with—and in fact extremely similar to—28 C.F.R. § 39.150.

28 C.F.R. § 39.150 (Rehabilitation Act)	28 C.F.R. § 35.150 (ADA)
(d) Transition plan. In the event that structural changes to facilities will be undertaken to	(d) Transition plan. (1) In the event that structural changes to facilities will be under-

achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. . . .	taken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. . . .
The plan shall, at a minimum–	(3) The plan shall, at a minimum–
(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;	(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
(2) Describe in detail the methods that will be used to make the facilities accessible;	(ii) Describe in detail the methods that will be used to make the facilities accessible;
(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and	(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.	(iv) Indicate the official responsible for implementation of the plan.

Congress thus specifically indicated through the plain text of 42 U.S.C. § 12134 its intent to implement § 12132's anti-discrimination provision by requiring public entities to prepare and implement transition plans, and Congress even required that such plans meet certain requirements. Despite the fact that § 12134 specifically directs the Attorney General to implement § 12132 by adopting transition-plan regulations, the Ninth Circuit never addressed § 12134 in its opinion.

Fourth, this Court has explained that when Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134, *and* a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Just as this Court in *Sandoval* did "not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section," 532 U.S. at 284, here too there should be no doubt that the transition-plan regulations implementing § 12132's ban on discrimination fall squarely within a cause of action to enforce § 12132. Under *Sandoval*, therefore, Congress intended to provide a private right of action to enforce the ADA transition-plan regulations. *Chaffin*, 348 F.3d at 858 ("The [transition-plan] regulations simply provide the details necessary to implement the statutory right created by § 12132 of the ADA. They do not prohibit otherwise permissible conduct.") (citation omitted).

In its decision below, the Ninth Circuit acknowledged that "regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action." App. 9a. That acknowledgment should have been the end of its analysis, because the transition-plan regulations effectuate rights specifically laid out in the text of the ADA. See 42 U.S.C. §§ 12132, 12134. But in spite of the clear language of the ADA, the Ninth Circuit concluded that the ADA transition-plan regulation "is not enforceable through [§ 12132's] private right of action because the obligations it imposes are nowhere to be found in [§ 12132's] plain language." App. 11a. The Ninth Circuit reached this conclusion only by ignoring § 12134 and by misreading *Sandoval*.

In *Sandoval*, this Court considered whether Title VI regulations prohibiting a disparate impact could be enforced through a private right of action granted under a statute that forbade only intentional discrimination. "Both the Government and respondents argue[d] that the *regulations* contain rights-creating language and so must be privately enforceable," but this Court explained that the right must be created by statutory text. 532 U.S. at 291. Noting that "§ 601 prohibits only intentional discrimination," *id.* at 280, this Court concluded that § 601 did not create a right to be free from a disparate impact: "It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore [make] clear that the private right of action to enforce § 601 does not include a private right of action to enforce these regulations." *Id.* at 285. After analyzing the statute, this Court "found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Id.* at 291. "Language in a regulation," this Court continued, "may invoke a private right of action that Congress through statutory text created, but it may not create a right Congress has not." *Id.*

In contrast here, Congress did, through the statutory text, create the right to a transition plan. Section 12134 specifically provides that the regulations "implement this part," which includes § 12132, and expressly requires the ADA regulations to be consistent with the Rehabilitation Act regulations that require a transition plan. See 42 U.S.C. § 12134(b) ("[S]uch regulations shall be consistent with regulations . . . in [28 C.F.R. part 39]."); see also 28 C.F.R. § 39.150(d) (requiring agencies to develop . . . a transition plan setting forth the steps necessary to complete such changes"). And § 12133 creates a private right of action to address violations of § 12132. Furthermore, the Attorney General authoritatively interpreted § 12134's specific requirement that he adopt transition-plan regulations as effectuating

§ 12132's discrimination prohibition. Under *Sandoval*, then, Congress's clear intent to create a private right of action to enforce the discrimination prohibition demonstrates that it also intends that the regulation implementing that prohibition be enforceable by a private right of action.

The Ninth Circuit also based its ruling on the conclusion that "[t]he existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access." App. 10–11a. That argument disregards the fact that Congress created the right to a transition plan in the ADA and authorized aggrieved individuals to seek an injunction enforcing that right. And the facts of this case demonstrate exactly why Congress imposed this requirement. Congress placed the burden on public entities to "[i]dentify physical obstacles . . . that limit" accessibility, 28 C.F.R. § 35.150(d)(3)(i), so that an individual with a disability would not have to encounter dangerous or impassible obstacles during the course of ordinary life, and then be forced to litigate each one on a case-by-case basis to provide access. Accord Common Problems, *supra*. In short, Congress required public entities to provide a roadmap through the minefield, not just a right to sue after stepping on a mine.

Here, for example, because the City violated the regulation by failing to complete its transition plan by July 26, 1992 and by failing to take steps necessary to achieve compliance with the plan, 28 C.F.R. § 35.150(d)(3), Mr. Lonberg has spent the last 18 years of his life risking tipping over in his wheelchair, getting stuck, or getting hit by traffic when he cannot travel on the sidewalks, without even being provided information about which intersections and sidewalks to avoid. This case demonstrates Congress's wisdom in allowing private citizens to sue to require a city to develop a transition plan, rather than requiring such citizens to themselves identify and be injured by each individual obstacle before they could seek redress.

The Ninth Circuit also contended that "a public entity may be fully compliant with [§ 12132] without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." App. 11a. That is of course not this case, but in any event, the transition-plan regulation does not apply when a public entity is fully compliant: a transition plan is necessary only "[i]n the event that structural changes to facilities will be undertaken to achieve program accessibility." 28 C.F.R. § 35.150(d). Thus, a fully compliant public entity would not need to make structural changes and would not need to develop a transition plan. And while the Ninth Circuit correctly notes that a public entity with a transition plan could still violate § 12132, that does not justify disregarding this statutorily created requirement. Moreover, having the plan would both provide individuals with a disability with notice of the obstacles remaining in their community, which would help them avoid the obstacles, and would provide those individuals with the right to participate in the process of prioritizing the removal of the obstacles. 28 C.F.R. § 35.150(d). Having a transition plan would give effect to those rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DON A. ERNST
TERRY J. KILPATRICK
ERNST & MATTISON, APC
1020 Palm Street
San Luis Obispo, CA 93401
(805) 541-0300

JOHN J. BURSCH
Counsel of Record
MATTHEW T. NELSON
AARON D. LINDSTROM
JULIE LAM
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
jbursch@wnj.com

Counsel for Petitioner

APRIL 2010

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN LONBERG, an individual, *Plaintiff-Appellee,* v. CITY OF RIVERSIDE, a municipal corporation, *Defendant-Appellant.*	No. 06-55781 D.C. No. CV-97-00237-SGL OPINION

Appeal from the United States District Court
for the Central District of California
Stephen G. Larson, District Judge, Presiding

Argued and submitted
February 2, 2009—Pasadena, California

Filed June 26, 2009

Before: Cynthia Holcomb Hall, Barry G. Silverman
and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan;
Dissent by Judge Silverman

COUNSEL

Gregory F. Hurley and Stacey L. Herter of Greenberg Traurig, LLP, Costa Mesa, California, for the defendant-appellant.

Terry J. Kilpatrick, San Luis Obispo, California, and Page Wellcome, Cardiff-by-the-Sea, California, for the plaintiff-appellee.

OPINION

CALLAHAN, Circuit Judge:

In 1997, John Lonberg ("Lonberg"), a paraplegic, initiated a lawsuit against the City of Riverside ("City"), alleging violations of the Americans with Disabilities Act ("ADA") and its accompanying regulations. The district court divided the lawsuit into three phases. Phase one, the only phase at issue in this appeal, concerns Lonberg's claim that the City's plan to achieve ADA compliance did not meet the standards set forth in 28 C.F.R. § 35.150(d). The district court granted Lonberg's request for a permanent injunction and ordered the City to prepare a transition plan that complies with Section 35.150(d). The City appeals, arguing that Section 35.150(d) is not privately enforceable.

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), *see Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 984 (9th Cir. 2007), and we REVERSE and VACATE the permanent injunction.

I.

During the first phase of this lawsuit, Lonberg moved for partial summary judgment regarding the City's alleged non-compliance with Section 35.150(d), which requires public entities to develop a "transition plan" for achieving the ADA's accessibility requirements.[1] On June 12, 2000, the district court granted Lonberg's motion, concluding that the City had failed to comply with Section 35.150(d). Significantly for purposes of this appeal, in granting Lonberg's motion the district court commented in a footnote that "[p]laintiff ha[d] not requested any specific remedy in connection" with his motion, "and in particular [did] not request[] injunctive relief."

---

[1] 28 C.F.R. § 35.150(d) provides, in relevant part, as follows:

> Transition Plan. (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.
>
> (2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs,
>
> . . . .
>
> (3) The plan shall, at a minimum —
>
>> (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
>>
>> (ii) Describe in detail the methods that will be used to make the facilities accessible;
>>
>> (iii) Specify the schedule for taking the steps necessary to achieve compliance with this Section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
>>
>> (iv) Indicate the official responsible for implementation of the plan.

Lonberg subsequently moved for a preliminary injunction directing the City to prepare an adequate transition plan. For reasons that are not clear from the record before us, the district court deemed Lonberg's motion moot, and set a bench trial for May 2001 on the adequacy of the City's transition plan. Nearly five years after the trial, on March 17, 2006, the district court issued findings of facts and conclusions of law in Lonberg's favor.[2] The court found numerous faults with the City's transition plan, including its purported failure to sufficiently identify particular physical obstacles limiting accessibility to the City's streets, intersections, sidewalks and crosswalks. It also faulted the plan for, among other things, failing to describe in sufficient detail the methods the City would use to achieve accessibility. Accordingly, the district court entered a permanent injunction requiring the City to "prepare a transition plan that complies with the ADA and § 35.150."

After the district court entered the permanent injunction, the City moved for a new trial, arguing for the first time that Section 35.150(d) is not enforceable through a private cause of action. Despite

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[2] While the parties litigated "phase one," Lonberg also pursued his claims for damages and injunctive relief in connection with the City's alleged failure to make its sidewalks and curb ramps accessible.

Lonberg's objection that the City had waived any such argument, the district court denied the City's motion on its merits, holding that "Lonberg does have a private right of action . . . for injunctive relief compelling the City to comply with its obligations under Section 35.150(d)."

II.

The City appeals, seeking to vacate the permanent injunction based on Lonberg's alleged lack of standing to privately enforce Section 35.150(d).

A.

[1] On appeal, Lonberg maintains that the City has waived its challenge regarding the enforceability of Section 35.150(d) by failing to raise it until after trial. Specifically, he asserts that the City's challenge is a waivable Rule 12(b)(6) defense. *See* Fed. R. Civ. P. 12(h)(2) (providing that a Rule 12(b)(6) defense must be raised no later than trial.) Although the City's challenge may be characterized as a Rule 12(b)(6) defense, it also implicates the legal validity of the injunction. We have, in the past, addressed such issues even where they were not timely raised below, and we conclude that it is a proper exercise of our discretion to do so here. *Cf. Price v. City of Stockton*, 390 F.3d 1105, 1108 (9th Cir. 2004) (reaching the issue of whether a statute created a private right of action even when the district court failed to address it in the first instance); *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1114 (9th Cir. 2006) (exercising discretion to reach a purely legal issue that plaintiffs raised only during oral argument before the district court).

[2] Reaching the merits of this issue results in no harm to Lonberg, since he had an opportunity to brief this issue fully in district court.[3] Indeed, the district court declined to find waiver, and addressed this issue on its merits, adopting the Tenth Circuit's view that Section 35.150(d) is privately enforceable. *See Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003). Accordingly, we conclude that this issue, which was raised below and addressed on its merits by the district court, and which underpins the validity of the injunction at issue, is properly before us for a determination on the merits.

B.

We review de novo whether a statute or regulation creates a private cause of action. *Townsend v. Univ. of Alaska*, 543 F.3d 478, 482 (9th Cir. 2008). Whether Section 35.150(d) creates a private right of action is an issue of first impression in this court, and one on which other circuits have split. *Chaffin*, 348 F.3d at 858 (holding that Section 35.150(d) creates a private right of action); *Ability Ctr. Of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004) (holding that Section 35.150(d) does not create a private right of action); *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006) (same). We agree with the First and Sixth Circuits and hold that Section 35.150(d) does not create a private right of action.

---

[3] Moreover, as noted below, we conclude that Lonberg's remedy lies not in the enforcement of a transition plan, but in the removal of barriers to meaningful access.

1. *Alexander v. Sandoval*

The Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275 (2001), governs our analysis, as it sets forth the framework for determining whether a federal regulation is enforceable through a private right of action.

In *Sandoval,* a class of non-fluent English speakers sued the Alabama Department of Public Safety, alleging that its administration of an English-only driver's license test violated 28 C.F.R. § 42.104(b)(2),[4] "because it had the effect of subjecting non-English speakers to discrimination based on their national origin." 532 U.S. at 278-79. The Court reversed an injunction requiring the department to accommodate non-English speakers, holing that 28 C.F.R. § 42.104(b)(2) was not enforceable through a private cause of action. *Id.* at 293.

[3] The Court explained that "private rights of action to enforce federal law must be created by Congress . . ., [and that] [t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286 (internal citations omitted).

The relevant statute in *Sandoval* was § 601 of Title VI of the Civil Rights Act of 1964, as it was the statute that § 42.104(b)(2) was meant to implement.[5]

---

[4] 28 C.F.R. § 42.104(b)(2) prohibits a recipient of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."

[5] Section 42.104(b)(2) was promulgated under § 602 of Title VI of the Civil Rights Act of 1964, which authorizes federal

[Footnote continued on next page]

See id. at 278. Section 601 bans recipients of federal funding from intentionally discriminating against individuals "on the ground of race, color, or national origin" in connection with any program or activity covered by Title VI. *Id.* (citing 42 U.S.C. § 2000d). The Court noted that Congress clearly intended § 601 to be enforceable through a private right of action, *see id.* at 280 (citing 42 U.S.C. § 2000d-7, which "expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI"), but determined that this cause of action did not extend to all the regulations meant to implement it.

In determining whether a particular regulation is enforceable through a statute's private right of action, the Court explained that we must look to the statute itself and determine whether it displays Congress's intent to create the private right purportedly contained in the regulation. *Id.* at 286. The Court stated that absent such intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

The Court determined that § 601 only banned intentional discrimination, and said nothing about activities that may have a discriminatory effect. Accordingly, it held that the disparate-impact regulations, though perhaps otherwise valid, were not enforceable through § 601's private cause of action

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[Footnote continued from previous page]
agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." *Sandoval,* 532 U.S. at 278 (quoting 42 U.S.C. § 2000d-1).

because they did not "simply apply § 601['s]" ban on intentional discrimination and instead "forbid conduct that § 601 permits." *Id.* at 285. In other words, because the plain language of § 601 only banned intentional discrimination, only those regulations effectuating that ban could be enforced through § 601's private cause of action. To hold otherwise, the Court reasoned, would allow "language in a regulation . . . [to] conjure up a private cause of action that has not been authorized by Congress." *Id.* at 291.

[4] Thus, *Sandoval* instructs that because only Congress can create a private right of action through statute, we must examine a challenged regulation in the context of the statute it is meant to implement. Only those regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action; regulations that do not encapsulate the statutory right and corresponding remedy are not privately enforceable.

2. *Application of* Sandoval *to Section 35.150(d)*

[5] In determining whether Section 35.150(d) is enforceable through a private right of action, we look to the statute it is meant to implement: § 202 of Title II of the ADA, which prohibits discrimination by public entities on the basis of disability.[6] Section 202 is enforceable through a private right of action, *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 906 (6th Cir. 2004), (citing *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002)), and provides

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[6] Section 35.150(d) was promulgated by the Attorney General pursuant to § 204 of the ADA, 42 U.S.C. § 12134, in order to implement § 202. *See* 28 C.F.R. § 35.101.

that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1990).

[6] The plain language of § 202 prohibits public entities *from* discriminating against qualified disabled individuals in its administration of services and programs. This prohibition against discrimination is universally understood as a requirement to provide "meaningful access." *See, e.g., Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (noting that the ADA requires reasonable modifications necessary to ensure "meaningful access") (citing *Southeastern Comty. College v. Davis*, 442 U.S. 397, 410 (1979)); *Ability Ctr.*, 385 F.3d at 913 (noting Title II's express aim of providing meaningful access by requiring public entities to alter city streets and sidewalks); *Chaffin*, 348 F.3d at 857 (noting its prior holding that "the ADA requires public entities to provide disabled individuals '*meaningful* access'"). Section 202 says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan.

[7] Further, and perhaps most importantly, nothing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in the private enforcement of Section 35.150(d)'s detailed transition plan requirements. *See Sandoval*, 532 U.S. at 286 (emphasizing that the operative statute must display "an intent to create not just a private right but also a private remedy"). The existence or non-existence of a transition plan

does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access.[7] Indeed, a public entity may be fully compliant with § 202 without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy. *See Ability Ctr.*, 385 F.3d at 914; *see Iverson*, 452 F.3d at 101. Conversely, a public entity may have a transition plan that complies with Section 35.150(d), but may still be in violation of § 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access.

[8] We do not suggest that Section 35.150(d) is invalid or an otherwise improper exercise of agency discretion We simply conclude that under *Sandoval*, it is not enforceable through § 202's private right of action because the obligations it imposes are nowhere to be found in § 202's plain language. Moreover, requiring a public entity to create a transition plan does not directly remedy a denial of § 202's right to meaningful access.

Our conclusions are consistent with the approach outlined by the Sixth Circuit in *Ability Center* and adopted by the First Circuit in *Iverson*. *Ability Ctr.*, 385 F.3d at 914; *Iverson*, 452 F.3d at 100-01.

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[7] Tellingly, in his 2001 motion for partial summary judgment with respect to the City's transition plan, Lonberg sought no remedy other than a declaration that the City was not in compliance with the regulation. Had Section 35.150(d) been the true vehicle to right the wrongs caused by the City's alleged ADA violations, Lonberg might have asked for some actual relief in connection with his first attempt to enforce that regulation.

Although the Tenth Circuit held otherwise in *Chaffin*, it did not address whether § 202 evinced congressional intent to create a private right to a transition plan, or whether such a plan would remedy the denial of meaningful access. Instead, it applied *Sandoval* broadly to a host of ADA regulations, and without addressing each one individually concluded that they all "simply provide[d] the details necessary to implement the statutory right created by § [202] . . . of the ADA," and did "not prohibit otherwise permissible conduct." *Chaffin*, 348 F.3d at 854, 857-58 (holding that 28 C.F.R. §§ 35.150, 35.151, and the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), 28 C.F.R. pt. 36, app. A, were all privately enforceable).

It is true that Section 35.150(d) does not "prohibit" conduct that is otherwise permissible under § 202 as the challenged regulation in *Sandoval* did with respect to § 601 of Title VI of the Civil Rights Act. However, we read *Sandoval* to require a more particularized review of the challenged regulation than was undertaken by the Tenth Circuit in *Chaffin*, in addition to a determination of whether the regulation effectuates the statutory right and corresponding remedy. As set forth above, the application of this requisite inquiry with respect to 35.150(d) leads us to conclude that it is not enforceable through § 202's private right of action. This holding does not preclude another panel from finding that other regulations promulgated to effectuate § 202 are privately enforceable, nor does it prevent Lonberg from pursuing his pending claims for damages and injunctive relief raised in the other phases of this litigation. Indeed, to the extent the City is in violation of the ADA and its attendant regulations, Lonberg's true remedy would lie in an injunction requiring the actual removal of barriers that prevent meaningful access.

III.

[9] Based on the foregoing, we hold that 28 C.F.R. § 35.150(d) is not enforceable through the private right of action under § 202 of Title II, 42 U.S.C. § 12132, and we REVERSE and VACATE the district court's permanent injunction.

SILVERMAN, Circuit Judge, dissenting:

Because I believe the City of Riverside waived its argument that 28 C.F.R. § 35.150(d) is not privately enforceable, I dissent.

The City did not raise this defense in its answer, in a motion to dismiss, in a motion for summary judgment, or even at trial. Instead, the City waited until *after trial* — after the district court issued a decision in Lonberg's favor — to argue for the first time in a motion for new trial that § 35.150(d) is not privately enforceable. Even worse, after Lonberg argued in his opening brief to us that the City had waived this argument by not raising it before trial, the City offered not one word of rebuttal about the waiver argument. It seems to me the City has doubly waived its argument — it did not raise it prior to trial in the district court and it failed to reply to the waiver argument made before us in the court of appeals.

Under Federal Rule of Civil Procedure 12(h)(2), a Rule 12(b)(6) defense must be raised at or before trial. Here, the City raised its defense after the trial concluded *and* after the district court rendered a decision against it, even though "the City's [defense] may be characterized as a Rule 12(b)(6) defense," as the majority itself acknowledges.

Even if we have the discretion to reach this issue notwithstanding the City's failure to perfect it below, I do not see why we should. The City's belated assertion of this new defense is most unfair to Lonberg who prevailed at trial in the face of the defenses that *were* raised and litigated. Why should the City be allowed to wait until it loses and then get another chance to raise an entirely new non-jurisdictional defense that was perfectly available before? This makes a mockery of the rules of civil procedure requiring that claims and defenses be timely raised. There are good reasons for these rules, too — like fairness and avoidance of surprise.

What is the City's answer to Lonberg's assertion that the new argument has been waived? Nothing. Not a word. In its brief before us, the City offered no explanation whatsoever for its failure to raise its argument earlier, or even a justification for why the argument has *not* been waived. The City's brief is totally silent in response to Lonberg's claim of waiver. This failure alone counsels against the exercise of discretion to consider the City's new-found position at this late date.

I would affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN LONBERG, Plaintiff, v. CITY OF RIVERSIDE, Defendant.	CASE NO. EDCV 97-00237-RT(AJWx) PERMANENT INJUNCTION

On March 17, 2006, the Court filed its Findings of Fact and Conclusions of Law finding and concluding that defendant City of Riverside ("City")'s Transition Plan for its streets and sidewalks is inadequate and not in compliance with the requirements of the American With Disabilities Act, 42 USC 12131 *et seq.* ("ADA"), and its implementing regulations entitled "Non Discrimination On The Basis Of Disability In State And Local Government Services" and particularly Section 35.150 of Title 28, Code of Federal Regulations (Section 35.150).

IT IS HEREBY ORDERED that Defendant City of Riverside shall prepare a Transition Plan that complies with the ADA and §35.150. The City's Transition Plan shall include among other things:

1. a schedule for providing curb ramps where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the ADA, including state and local government offices and facilities, transportation, places of public accommodation, and

employers, followed by walkways serving other areas;

2. identify physical obstacles on the City's streets and sidewalks, including existing curb ramps, that limit accessibility of such streets and sidewalks to individuals with disabilities;

3. describe in detail the methods that will be used to make the streets and sidewalks, including existing curb ramps, accessible to persons with disabilities; and

4. specify the schedule for taking the steps necessary to achieve compliance with Section 35.150 and, if the time period of the Transition Plan is longer than one year, identify steps that will be taken during each year of the Transition Period.

In regarding to the identification of physical obstacles on the City's streets and sidewalks, the Transition Plan shall identify those areas on the City's streets and sidewalks, including existing curb ramps, that fail to meet the current applicable design standards in §§ 4.3 through 4.8 of the American with Disabilities Act Accessibility Guidelines ("ADAAG") found at 28 C.F.R. Part 36, Appendix A.

IT IS FURTHER ORDERED that the City shall prepare and complete an adequate Transition Plan consistent with this injunction and the Court's Findings of Fact and Conclusions of Law no later than July 24, 2006.

Dated: March 21, 2006

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN LONBERG, Plaintiff, v. CITY OF RIVERSIDE, Defendant.	CASE NO. EDCV 97-00237-RT(AJWx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

The case is now before the Court on Plaintiff's Motion for a Permanent Mandatory Injunction direction. Having heard the testimony offered by the parties at trial and the argument of counsel, and after reviewing the documentary evidence, the Court makes the following Findings of Fact and Conclusions of Law based on the credible evidence and the reasonable inferences to be drawn therefrom.

If certain findings of fact more correctly should be conclusions of law and if certain conclusions of law more correctly should be findings of fact, then each entry so designated is deemed to be the other.

FINDINGS OF FACT

1. Plaintiff John Lonberg ("Lonberg"), is a resident of the City of Riverside and a paraplegic who is required to use a wheelchair for mobility.

2. Defendant City of Riverside ("City"), is a municipal corporation and charter city of the State of California that employs more than 50 people.

3. Lonberg is required to use a wheelchair for mobility and he uses both manual and battery-powered wheelchairs.

4. Lonberg uses the streets and sidewalks in the City on a regular and ongoing basis. Among other things, Lonberg uses the streets and sidewalks to:

(A) travel to public hearings;

(B) investigate disability access complaints;

(C) go shopping;

(D) take his grandchildren to sporting events;

(E) patrol the streets as a Handicap Parking Patrol Officer;

(F) perform work as a disability access consultant;

(G) go to restaurants and attend social functions;

(H) accompany his grandchildren to a school; and

(I) regularly go to Kaiser Hospital, which is located several blocks from his house.

5. There are approximately 5,100 street intersections and 1,100 miles of sidewalks in the City. Assuming an average of four curb returns per intersection, there are approximately 20,000 curb returns throughout the City.

6. Based on surveys prepared by City's staff, there are thousands of physical obstacles on the

City's streets and sidewalks including 7,400 areas missing curb ramps[1] for wheelchairs, and numerous existing curb ramps that are either in disrepair of otherwise not constructed in compliance with state and federal design requirements. Additionally, City has identified thousands of physical obstacles on City's sidewalks, including such things as missing sidewalks, sidewalks that are too narrow, sidewalks with gaps or ledges greater than one-inch, and sidewalks with cross-slopes greater than two percent.

7. Lonberg travels in his wheelchair on certain streets and sidewalks of City on a daily basis and in so doing he regularly encounters physical obstacles on those streets and sidewalks that make it difficult or impossible for him to traverse them. These obstacles prevent Lonberg from using certain City streets and sidewalks, or require him to expend a significant amount of physical energy or to risk his health and safety by going around or through the obstacles.

8. An improperly designed curb ramp is a source of delay and frustration as persons in wheelchairs must circumvent the curb ramp or expend a significant amount of additional time and energy to force their way through or around the obstacle. These problems are compounded by the fact that the obstacles are difficult to see, particularly at night. In those instances, Lonberg is at great risk of tipping over, getting stuck, damaging his wheelchair, or having to risk his safety by traveling in the street. City's preliminary findings refer to thousands of physical obstacles on the City's streets and sidewalks. The

---

[1] Another term for curb ramps is "curb cuts".

challenges that Lonberg faces due to these obstacles cause him irreparable harm.

9. On June 12, 2000, the Court granted Plaintiff's Motion for Summary Judgment concluding as a matter of law that City did not have an adequate Transition Plan "within the meaning of Section 35.150(d) regarding structural alteration of its street facilities to achieve program accessibility by disabled persons"

10. Subsequently, on November 28, 2000, the City adopted a document entitled "Amendment to the City's Transition Plan" (Exhibit 593). This document contains City policies to eliminate physical obstacles on City's streets and sidewalks associated with the need to construct new curb ramps where sidewalks cross curbs at intersections and to replace or modify existing curb ramps, including the following:

> (A) Wheelchair ramps will be installed at locations where none exist whenever a roadway undergoes pavement rehabilitation or replacement.
>
> (B) Existing wheelchair ramps that are not in compliance with today's ADA standards will be replaced or modified whenever a roadway undergoes pavement rehabilitation or replacement.
>
> (C) Each year the City will appropriate funding for providing wheelchair ramps where sidewalks cross curbs.
>
> (D) The City will continue to work with the Advisory Committee on Disability Access Issues in prioritizing the yearly implementation of the City's ADA Transition Plan for each year during the transition period.

(E) A wheelchair ramp will be installed whenever a new curb is constructed causing a sidewalk to cross the curb.

(F) A wheelchair ramp will be installed whenever a sidewalk that crosses a curb is repaired by removal and replacement.

(G) Wheelchair ramps will be installed at intersections whenever a new sidewalk is constructed.

(H) The installation of wheelchair ramps on all City streets will be completed by 2030.

(I) The Public Works Director is the City official responsible for implementation of the City's ADA Transition Plan for providing wheelchair ramps.

11. At approximately the same time City adopted these policies, it prepared a survey of missing curb ramps and determined there are approximately 7,400 locations throughout the City missing curb ramps.

12. On July 10, 2001, City adopted a document entitled "Amendment to ADA Transition Plan: Summary of Transition Plan For Improving Sidewalks in the Public Right of Way" (Exhibit 604). This document contains City policies regarding the construction and maintenance of sidewalks, within its public rights of way to eliminate physical obstacles therefrom, including the following:

(A) All new sidewalks will be constructed in compliance with state and federal disabled access regulations.

(B) Whenever a sidewalk is repaired by removal and replacement, a sidewalk complying with state and federal disabled access regulations will be installed.

(C) Each year City will appropriate funding for improving additional sidewalks. That funding may be affected by the availability of state and federal funding available to the City in any given year.

(D) The City will continue to work with the City's committees on disability issues in prioritizing the yearly implementation of sidewalk improvements for each year during the transition period.

(E) The City will continue to solicit and respond to requests by citizens to install, improve or repair sidewalks within the City.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to Title 28 of the United States Code § 1331.

2. Lonberg has standing to allege his first claim of the complaint for violation of Title II of the Americans With Disabilities Act, 42 USC § 12101 *et seq.* ("ADA") by challenging the adequacy of the Transition Plan and to seek mandatory injunctive relief compelling the City to prepare an adequate Transition Plan. Armstrong -v- Davis, 275 F.3d 849, 861-863 (9th Cir. 2001).

3. Lonberg is a "qualified individual with a disability" as that term is defined under the Americans With Disabilities Act at 42 USC § 12131 in that he is permanently disabled and requires a wheelchair for mobility.

4. City is a public entity as that term is defined under the ADA at 42 USC § 12131 in that it is a

municipal corporation and charter city of the State of California. The City has responsibility or authority over the streets, sidewalks, roads, and walkways (hereinafter "streets and sidewalks"), in the public rights-of-way of City.

5. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC § 12132.

6. The ADA itself does not require a public entity such as City to prepare or implement a Transition Plan regarding its existing facilities. The requirement is found in Section 35.150 of Title 28 of the Code of Federal Regulations (Section 35.150), promulgated by the Department of Justice, pursuant to a congressional grant of regulatory authority contained in 42 USC § 12134(a).

7. Paragraph (a) of Section 35.150 provides that "a public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and useable by individuals with disabilities . . . ."

8. The City's public streets and sidewalks, including curb ramps, constitute a service, program or activity within the meaning of Title II of the ADA and are subject to the regulations promulgated in furtherance of Title II including §35.150. *Barden, et al. -v- City of Sacramento, et al.*, 292 F.3d 1073, 1077-78 (9th Cir. 2002), *cert denied* 539 U.S. 958 (2003).

9. Section 35.150(d)(3) requires that City's Transition Plan shall, at a minimum:

i. Identify physical obstacles in [its] facilities that limit the accessibility of its programs or activities to individuals with disabilities;

ii. Describe in detail the methods that will be used to make the facilities accessible;

iii. Specify the schedule for taking the steps necessary to achieve compliance with this Section and, if the time period of the Transition Plan is longer than one year, identify steps that will be taken during each year of the transition period.

10. Section 35.150(d)(3) applies to "Facilities" as used in Section 35.150(d)(1) and to "streets, roads or walkways" as used in Section 35.150(d)(2).

11. Section 35.150 encompasses all public rights-of-way in City without a programmatic limitation.

12. The City has planned and continues to plan to undertake structural changes in its streets and sidewalks in order to comply with its obligations under Title II of the ADA and Section 35.150, and it is subject to paragraph (c) of Section 35.150 regarding the time for compliance with its obligations under Section 35.150.

13. Section 35.150(c) states that where structural changes in existing facilities will be undertaken by a public entity to comply with its obligations under Section 35.150, "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible."

14. Section 35.150(d)(2) specifies that for curb ramps and sidewalks, changes shall be implemented by giving priority to walkways serving entities covered by the ADA, including State and local

government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

15. Even with the amendments of November 28, 2000, and July 10, 2001, to the City's Transition Plan, the City has not prepared an adequate Transition Plan as required under Title II of the ADA and those regulations promulgated thereto including the Department of Justice implementing regulations found in Section 35.150 and particularly paragraphs (c) and (d) thereof.

16. The City's surveys of the public streets, intersections, sidewalks, and crosswalks in the City regarding curb ramps to be constructed (Exhibit 611), as referenced in Exhibit 593 and its similar surveys regarding physical obstacles in the City's sidewalks and other public rights-of-way, including existing curb ramps (Exhibit 611), as referenced in Exhibit 604 so as to meet the standards of the American With Disabilities Act Accessibility Guidelines ("ADAAG"), are not sufficient to meet the minimum requirements for a Transition Plan under Section 35.150(d).

The surveys do not sufficiently identify the particular physical obstacles on the City's streets and sidewalks that limit the accessibility of such streets and sidewalks to individuals with disabilities including persons using wheelchairs, e.g., dimensional deficiencies in curb ramps, excessive cracks in the sidewalks, raised surfaces at the bottom of curb ramps, or along sidewalks in excess of 1/4 inch, subsidence in sidewalks, driveway cross slopes too steep, driveway "lips" too large.

The surveys do not describe in detail the methods that the City will use to make the streets and sidewalks accessible to individuals with disabilities. Further the Transition Plan, including Exhibits 593 and 604, does not identify in a schedule the specific steps that will be taken during each year of the Transition Plan period, to achieve compliance with Section 35.150.

17. ADAAG[2], provides the proper standards for determining, whether or not a "physical obstacle" exist in a City street or sidewalk within the meaning of Section 35.150(d)(2) and (d)(3)(i). Curb ramps are not the only sidewalk feature to be encompassed in the Transition Plan pursuant to Section 35.150(d). SubSection (3) of Section 35.150(d) applies not only to installation of new curb ramps, but also to all physical obstacles on the streets and sidewalks of the City, including noncompliant existing curb ramps.

18. City has failed to identify in its Transition Plan any physical obstacles on the City's streets and sidewalks which include, among other things:

(A) Running Slopes and Side Flares: The City has failed to adequately identify areas in its streets and sidewalks where any running slope of curb ramps exceed 1:12 (ADAAG §§ 4.7.2, 4.8.2) and where any side flare slopes exceed 1:10 (ADAAG § 4.7.5). Even though the City's surveys note that "excessive slope" on curb ramps and side flares are physical obstacles, such notations do not relate to a specific ADAAG running slope and side flare standard.

(B) Transitions Between Curb Ramps and the Street: The City has failed to identify areas in its streets and sidewalks where the bottom of any curb ramps are not flush with the street and free of abrupt changes. (ADAAG §§ 4.7.2)

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[2] The ADAAG can be found at 28 C.F.R., Part 36, Appendix "A."

(C) Surfaces Adjoining Curb Ramps: The City has failed to identify areas in its streets and sidewalks where any top and bottom landings of curb ramps contain slopes in excess of 1:20(5%). (ADAAG § 4.7.2)

(D) Top Landings: The City has failed to identify areas in its streets and sidewalks where any landing depth at any top of curb ramps is less than 48 inches and the side flares of such curb ramps are greater than 1:12. (ADAAG § 4.7.5 Fig. 12(a) and 12(b).)

(E) Pedestrian Crossings: The City has failed to identify areas in its streets and sidewalks, where any curb ramps are not wholly contained within marked crossings, which is a source of conflict between cars and persons in wheelchairs. (ADAAG §4.7.9)

(F) Diagonal Curb Ramps: The City has failed to identify any obstacles on diagonal curb ramps in its streets and sidewalks, including (i) the lack of edges parallel to the direction of pedestrian flow, and (ii) a minimum 48-inches of clear space at the bottom of the ramp. (ADAAG §§4.7.10)

(G) Islands: The City has failed to identify those areas in its streets where any traffic islands are not level with the street, and thus present an obstacle to a wheelchair occupant attempting to cross the street. (ADAAG §4.7.11)

19. City's Transition Plan fails to describe in detail the methods that will be used to make the City's streets and sidewalks accessible.

City's policies as stated in Exhibits 593 and 604, which are part of the City's Transition Plan, are simply reiterations of the City's obligations under the ADA and Section 35.150, but do not meet the *requirements of subparts (i) and (ii) of paragraph* (d)(3) of Section 35.150 as to the identification of physical obstacles and as to the detailing of methods that will be used to make the streets and sidewalks accessible.

20. "Methods" means "a way, technique, process of or for doing something." Merriam-Webster's Collegiate Dictionary, 10th Edition (2001). City's Transition Plan, including, Exhibits 593 and 604 does not state in sufficient detail the systematic processes to be used by City to install new curb ramps in its streets and sidewalks and to remove physical obstacles in its streets and sidewalks, including existing non-compliant curb ramps in order to make such streets and sidewalks accessible to persons using wheelchairs.

21. City's Transition Plan is inadequate in that it fails to specify the schedule for taking the steps necessary to achieve compliance with Section 35.150 and, because the evidence establishes that the time of the Transition Plan is longer than one year, the Plan does not identify the steps which will be taken by the City in each year of the transition period to achieve compliance. See 35.150(d)(3)(iii). Indeed, the only reference in the Transition Plan to a time period for complete compliance refers to installation of new curb ramps by 2030.

22. "Whenever" means "at any or every time that" or as an adverb means "at whatever time". Merriam-Webster's Collegiate Dictionary, 10th Edition (2001). As used in the City's Transition Plan and particularly in Exhibits 593 and 604 "Whenever" is insufficient to establish the specificity for the schedule or time period required under Section 35.150 and particularly Paragraphs (c) and (d)(3)(iii) thereof.

23. Section 203 of the ADA states that the remedies and procedures set forth in Section 505 of the Rehabilitation Act are the remedies available to any person alleging discrimination under the ADA. 42 USC §12133. Section 505 of the Rehabilitation Act, provides that a person who is being discriminated against is entitled to injunctive relief. 29 USC § 794a.

24. Legal remedies are inadequate to provide Lonberg with the relief he seeks by the first claim of his complaint that the City violated the ADA, 42 USC §§ 12101, *et seq.*

25. Lonberg will suffer immediate and irreparable injury if the City does not timely prepare a Transition Plan in accordance with the requirements of Section 35.150.

26. The City's failure to prepare an adequate Transition Plan in violation of Title II of the ADA and Section 35.150 as an implementing regulation constitutes a violation of a civil rights statute. When a public entity, such as the City, violates a civil rights statute it is presumed that the plaintiff has suffered irreparable injury from the fact of such violation. *Silver Sage Partners -v- City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

27. A permanent injunction directing the City to prepare an adequate Transition Plan will advance the public interest by fulfilling the purpose of Title II of the ADA which is to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Barden -v- City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002), cert. denied 539 U.S. 958 (2003).

28. The balance of hardships favors Lonberg in that his ability to traverse the public streets and sidewalks of the City in a wheelchair will be seriously impeded and in some instances precluded in pursuing his normal daily lifetime activities.

29. The City has not complied with the requirements for a Transition Plan under Section 35.150(d) and the doctrine of substantial compliance does not apply. *Long -v- Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

30. The City, over a period of years, has engaged in a pervasive pattern of violating Title II of the ADA and the regulations related thereto, including Section 35.150, by not preparing an adequate Transition Plan in accordance with the requirements of Section 35.150 and particularly Paragraphs (c) and (d) thereof.

31. The undue financial burden exception provided in Section 35.150(a)(3) to the application of paragraph (a) does not apply to the requirement that City prepare an adequate Transition Plan pursuant to paragraph (d) of Section 35.150.

32. The City filed an answer to Lonberg's complaint, but did not assert therein, 11th Amendment sovereign immunity as an affirmative defense.

It then conducted extensive discovery and filed two motions for partial summary judgment. After receiving an adverse ruling on the summary judgment motions, City first asserted a claim of 11th Amendment sovereign immunity in a trial brief almost one year after those rulings by the Court. Such conduct is incompatible with the City's intent to preserve sovereign immunity as a defense and the City, by such conduct, waived its claim to 11th Amendment sovereign immunity. *In Re Bliemeister*, 296 F.3d 858, 861-62 (9th Cir. 2002).

Even if there was no waiver by the City of a claim to 11th Amendment sovereign immunity and even if the City is considered an "arm" of the State of California, as argued by the City (which the Court does not find as a matter of fact), City is not entitled to the protection of sovereign immunity under the 11th Amendment as to Lonberg's first claim for violation of Title II of the ADA because Congress expressly abrogated state sovereign immunity under Title II. *Miranda B. -v- Kitzhaber*, 328 F.3d 1181, 1184-5 (9th Cir. 2003); *Hason -v- Medical Board of California*, 279 F.3d 1167, 1170-1 (9th Cir. 2002), rehearing *en banc* denied 294 F.3d 1166 (9th Cir. 2002), and cert. dismissed 538 U.S. 958 (2003); *see Phiffer -v- Columbia River Correctional Institute*, 384 F.3d 791, 792-93 (9th Cir. 2004).

33. Lonberg is entitled to a permanent injunction directing the City to prepare an adequate Transition Plan for existing facilities including its streets and sidewalks as required under Title II of the Americans with Disabilities Act 42 USC §12101 *et seq.* ("ADA"), and its implementing regulation 28 C.F.R. §35.150, issued by the U.S. Department of Justice.

Dated: 3/17/06

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN LONBERG, Plaintiff, v. CITY OF RIVERSIDE, Defendant.	CASE NO. EDCV 97-00237-RT(AJWx) ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court, the Honorable Robert J. Timlin, has read and considered plaintiff John Lonberg (plaintiff)'s motion for partial summary judgment ("motion"), defendant City of Riverside (defendant or the City)'s opposition thereto, and plaintiff's reply, as well as the admissible evidence.

I.
BACKGROUND

This action is brought under Title II of the Americans with Disabilities Act (ADA) and related regulations, as well as under section 54 of the California Unruh Act. It concerns the City establishing wheelchair accessible curb ramps (curb cuts) on city streets.[1] This motion concerns only the

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[1] "The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily

[Footnote continued on next page]

question of the City's compliance or noncompliance with one federal regulation-28 C.F.R. § 35.150(d)-which requires certain municipalities to prepare and implement a "transition plan" detailing their plans to comply with the ADA as to those municipal facilities, including city streets, that were in existence prior to January 26, 1992 (transition plan).[2] Plaintiff simply moves for partial summary judgment on the issue whether or not defendant has prepared an adequate transition plan.

II.
EVIDENTIARY OBJECTIONS

Plaintiff objects to certain evidence submitted by defendant. The rulings are as follows:

1. DOT letter—Overruled. The Plaintiff fails to set forth admissible evidence to support the material facts concerning defendant's purported failure to produce the letter. Furthermore, the letter and

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[Footnote continued from previous page]
life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors." *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir.1993).

[2] Contrary to the thrust of a substantial portion of the parties' briefing, the motion does not involve the questions of defendant's compliance with 28 C.F.R. § 35.105, which requires public entities to have conducted a self-evaluation prior to January 26, 1993, or with defendant's compliance with the substantive anti-discrimination provisions of Title II of the ADA or related Department of Justice regulations.

supporting documents are admissible for certain purposes under Rule 803(8)(C) (governmental fact-finding exception) and are properly authenticated.

2A. Sustained—the regulations speak for themselves.

2B. Overruled

2C. Overruled.

2D. Overruled.

2E. Sustained as to the first sentence of ¶ 12; otherwise overruled.

2F. Overruled.

2G. Overruled.

2H(1). Sustained—document is not properly authenticated.

2H(2). Overruled.

3. Jason Douglas White's Supplemental Declaration: The motion to strike is denied. The objections are sustained on all the bases stated by the plaintiff.

Defendant objects to certain evidence submitted by plaintiff. The rulings are as follows:

A. Objection to Exhibit E of Declaration of Terence Kilpatrick-Sustained. The document is not properly authenticated, and constitutes impermissible hearsay.

B. Objections to Declaration of John Lonberg ("Lonberg")

1. Sustained—the paragraph states inadmissible legal opinion.

2. Sustained as to Exhibits C, D & E to Lonberg's declaration. Plaintiff has not set forth sufficient facts supporting consideration of his measurements of the slopes of the various curb cuts located in the City of Riverside under Rule 702 of the Federal Rules of Evidence. Overruled as to Exhibit B and paragraph 8. Plaintiff may testify that he observed 700 corners wholly lacking needed curb cuts. Defendant's argument that the ADA only applies to sidewalks constructed after 1992 is incorrect as a matter of law.

3. Overruled. The factual accessibilities and usability of a certain corner for a person in a wheelchair does not constitute a "legal conclusion."

4. Overruled.

5. Sustained.

6. Sustained.

7. Sustained.

8. Sustained.

9. Sustained—the videotape is irrelevant to the issues presented by the instant motion [3]

III.

UNCONTROVERTED MATERIAL FACTS

The following facts are undisputed material facts supported by admissible evidence.

Plaintiff is a resident of the City, a public entity within the meaning of the ADA, which employs more than 50 people. Plaintiff is also a paraplegic who uses a wheelchair within the City. Plaintiff is active with respect to wheelchair access issues in the City, and has long participated in a citizen's advisory committee that advises the City how to prioritize its ADA compliance programs. Plaintiff has personally observed over 700 street corners within the City which as of October 1998 did not have curb cuts providing for wheelchair access.

Defendant adopted in 1990, and then amended in 1998, a document entitled "[Amended] Transition Plan For the Americans With Disabilities Act." This document consists of 152 pages and does not mention curb cuts or the general City sidewalks.[4] Instead, it

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[3] For this reason the Court also will not consider the videotape submitted by defendant

[4] Defendant refers in its briefing to a transition plan consisting of over "3,000 pages, contained in 3 binders," which was not submitted to the Court for its consideration respecting the motion. Defendant has not, however, objected to the document identified as the City's transition plan which was submitted by plaintiff in support of his motion. The Court assumes that the

[Footnote continued on next page]

catalogues specific City facilities, such as recreational fields and parks, city buildings, and airports, and lists specific improvements which must be made in order to bring these particular facilities into compliance with the ADA.

In February 1998, City Public Works Director Rick McGrath distributed a memorandum describing the City's "ADA Wheelchair Ramp and Sidewalk Improvement Program." ("McGrath memorandum") This document outlines the City's plan to phase in curb cuts on major arteries and "high use streets where significant commercial businesses, schools, libraries and other public facilities are located" between 1998 and 2008. After 2008, the curb cut program will be implemented in residential areas. In addition to this program schedule, the City plans to construct individual curb cuts at specific locations requested by disabled citizens or advocacy organizations within one month of such a request (unless right of way must be acquired), even if the requested location was not yet scheduled to be brought into compliance with the ADA under the general priority schedule discussed above.

[Footnote continued from previous page]
referenced document does indeed constitute the City's transition plan.

IV.
ANALYSIS

A. Standard for Summary Judgment Motion

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Supreme Court and Ninth Circuit precedent establish the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific facts* showing that there is a genuine issue for trial." ' *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (quoting Fed.R.Civ.P. 56(e)) (emphasis added in court opinion) (citations omitted). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *See id.* at 630-31.

Rule 56(c) nevertheless requires this Court to enter summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position [is] insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). In order to defeat a motion for summary judgment, the plaintiff must present "significant probative evidence tending to support the complaint." *T.W. Elec. Sery.*, 809 F.2d at 630. This court thus applies to either party's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52, 106 S.Ct. at 2512.

Plaintiff moves for partial summary judgment on the ground that as a matter of law City has failed to prepare or implement a transition plan report which plaintiff alleges is required by Department of Justice regulations implementing the ADA (ADA regulations). This failure, plaintiff contends, violates both the ADA regulations and also the Unruh Act, which contains a provision stating that "[a] violation of the right of an individual under the [ADA] also constitutes a violation of [section 54 of the Unruh Act]." Cal. Civil Code § 54(c).[5] Defendant argues (1) that plaintiff may not sue under Title II of the ADA because he consulted with and assisted City in its planning to meet the requirements of the ADA and related regulations, and (2) there exists a genuine issue of material fact as to whether its transition plan complies with the ADA regulations.[6]

B. Conflict of Interest

Defendant argues that Lonberg may not sue the City to enforce its compliance with the ADA because he consulted with the City as to the development and implementation of its ADA programs and because he participated in advising the City how best to prioritize the spending of its available ADA compliance funds. Defendant relies on the "common law conflict of interest doctrine," citing a 1955 opinion of the California Attorney General for the proposition that "under the common law doctrine of conflict of interest an official cannot advance his or her private interest through official action."

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[5] The parties have neither briefed nor argued any issues pertaining to the scope of the Unruh Act in general, or this provision in particular. Most importantly, neither party addresses whether section 54(c) of the Unruh Act incorporates ADA implementing regulations such as the ADA regulations at issue here, or whether a defendant who violates Title II of the ADA regulations without discriminatory intent or, perhaps, deliberate indifference, and thus is subject to injunctive but not damages relief under the ADA, *see Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir 1998), can nonetheless be held liable for damages under section 54(c) of the Unruh Act. The Court expresses no opinion on these issues here. Because neither party directs any of its briefing at the Unruh Act issues arguably presented by the motion, the Court in this Order will determine whether the City's transition plan complied with the ADA and related federal regulations.

[6] Defendant further argues that its sidewalks, viewed in their entirety, comply with Title II of the ADA, and that its self evaluation activities complied with the ADA regulations. These issues are not before the Court with respect to the instant motion

Whatever the scope of this common law conflict of interest doctrine, it is not applicable here. Lonberg is not acting in an "official" capacity in prosecuting this lawsuit; he is acting as a private citizen who feels his federally (and state law) protected right to travel the City streets in the same manner as any other private citizen has been and is being infringed by the City. Regardless of his political stake in this matter, he is a disabled person within the meaning of the relevant statutes and he may sue in this Court to enforce the rights he believes those statutes grant him. Defendant's conflict of interest argument is specious, and the motion will not be denied on this basis.

C. ADA Regulations

The ADA itself does not require a public entity such as City to prepare or implement a transition plan. This requirement is found in the ADA regulations, promulgated by the Department of Justice, pursuant to a Congressional grant of regulatory authority contained in 42 U.S.C. § 12134(a). *See* 28 C.F.R. § 35.150(d) (requiring, in certain situations, public entities to prepare transition plans).[7] Neither plaintiff nor defendant briefs the issue whether this regulation is enforceable by a private citizen by means of a federal lawsuit. Several district courts have held that such a private right of action exists, at least where the plaintiff seeks only injunctive relief, and the Court, in the absence of argument to the contrary, agrees. *See, e.g. Matthews v. Jefferson,* 29 F.Supp.2d 525, 539 (W.D.Ark.1998); *Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329 (S.D.Cal.1997); *McCready v. Michigan State Bar,* 881 F.Supp. 300 (W.D.Mich.1995) (private action to enforce self evaluation regulation).

The applicable regulations are relatively straightforward. Subsection (a) of 28 C.F.R. § 35.150 (section 35.150) provides that "A public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities...." This regulation applies to facilities of a public entity which existed on January 26, 1992, and should be distinguished from 28 C.F.R. § 35.151, which applies to new construction and alterations of facilities performed after that date.

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[7] Neither party changes the validity of any ADA regulation under consideration here, and accordingly the Court need not consider whether, under the analysis required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), these regulations are substantively valid. *See Zimmerman v. Oregon Dept. of Justice,* 170 F.3d 1169 (9th Cir.1998) (holding that 28 C.F.R. § 35.140(a), prohibiting employment discrimination in public employment under Title II (as opposed to Title I) of the ADA, is invalid)

The regulation applies to city sidewalks, *see Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329, 1336 (S.D.Cal.1997) ("Streets are considered existing facilities under the regulations and, as such, curb ramps at existing sidewalks are subject to the general requirements for program accessibility."), and thus requires that defendant's streets "when viewed in their entirety," be readily accessible to and usable by individuals such as plaintiff who require wheelchairs for mobility.

The regulation does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." Section 35.150(a)(1). Rather, "A public entity may comply with the requirements of [the ADA regulations] through [a great many means, and a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with [the regulations]." Section 35.150(b)(1).

However, where structural changes in existing facilities are or will be undertaken to comply with the ADA regulations, "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." Thus, structural changes intended to bring a municipality into compliance with section 35.150(a) were to have been completed by January 26, 1995.

In addition, "[i]n the event that structural changes in facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." Section 35.150(d)(1). Thus, if and only if defendant will make structural changes in existing facilities in order to comply with the substantive anti-discrimination provisions of Title II of the ADA and the ADA regulations, defendant must prepare a satisfactory transition plan. If defendant plans to comply with the applicable disability access rules in some other way, it need not prepare such a plan.

Here, it is uncontroverted that defendant plans to make structural changes to its streets and sidewalks in order to comply with Title II of the ADA and the ADA regulations. Indeed, the McGrath memorandum outlining the "City's Wheelchair Ramp and Sidewalk Improvement Program," submitted by defendant, outlines a plan to engage in extensive structural renovation of existing streets and sidewalks in order to comply with these provisions of law. Thus, the Court concludes as a matter of law based on the uncontroverted facts that defendant is required to comply with the transition plan requirements of section 35.150(d).

That regulation imposes two basic requirements on defendant's mandatory transition plan. First, section 35.150(d)(2) requires the plan to contain a schedule for providing curb cuts where pedestrian walks cross curbs:

> If a public entity has responsibility or authority

> over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local places of public accommodation, and employers, followed by walkways serving other areas.

Second, section 35.150(d)(3) requires the plan to identify uncut curbs, and describe in detail how and when the curbs will be cut:

> The plan shall at a minimum-
>
> (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
>
> (ii) Describe in detail the methods that will be used to make the facilities accessible;
>
> (iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and
>
> (iv) Indicate the official responsible for implementation of the plan.

City contends that an entity need not specifically include all these details in a document entitled "transition plan" in order to satisfy the regulations. The Court agrees. As in *Schonfeld,* where a public entity has a sufficiently detailed curb cut plan in place, which plan comports with the above described requirements, the fact that the plan may not be part of the entity's formally designated ADA compliance program does not preclude the Court from considering it in determining the entity's compliance with the ADA and related regulations. Similarly, the fact that an entity may not have had such a plan in place within six months from June 26, 1992, as required by the ADA regulations, does not invalidate a subsequently adopted plan. *See Schonfeld,* 978 F.Supp. at 1335-36.

On the other hand, City must fully comply with the clear and specific commands of this regulation, which require it to have (years ago) created a detailed transition plan containing an inventory of physical obstacles in its streets and a year by year schedule of improvements to achieve compliance with Section 35.15. Defendant relies on section 35.150(a)(1) in correctly pointing out that it need not necessarily "make each of its facilities accessible and usable by individuals with disabilities" and repeatedly reminds the Court that its ADA compliance must be considered by viewing the City streets "in their entirety" per section 35.150(a). Although the ADA and the ADA regulations allow municipalities considerable flexibility in determining how best to comply with the general requirement that City services, programs and activities be accessible to the disabled, municipalities, in exchange for that compliance-flexibility, are subject to fairly rigorous planning and reporting requirements, such as section 35.150(d). Thus, while the City may comply with the substantive requirements of the ADA and its implementing regulations through various flexible means, it has relatively little discretion in how it complies with the transition plan requirement of section 35.150(d). With these principles in mind, the Court considers the admissible evidence submitted by City in opposition to plaintiff's contention that as a matter of law it has not satisfied the transition plan requirement.

The Court first notes that the City's document entitled "*Amended Transition Plan* for the Americans With Disabilities Act" makes no mention of the sidewalk curb cut issue with respect to the City's streets in general, but rather focuses on access issues on a site by site basis. This document does not satisfy section 35.150(d).

Next, the Court concludes that the McGrath memorandum explaining the City's "ADA Wheelchair Ramp and Sidewalk Improvement Program" also fails to satisfy the above discussed requirements.

This document contains the following curb cut policy:

> The Public Works Department will analyze the entire length of a selected roadway to identify the improvements necessary to provide reasonable wheelchair access at intersections and along adjacent pathways within the street right of way. As established by the [City's] previous policy, the first priority for construction of these improvements will be along arterial streets as the

> primary travel corridors within the City, linking numerous residential, commercial, institutional and industrial areas. The second priority[ ] will be along high use streets, where significant commercial businesses, schools libraries and other public facilities are located. *The Department goal will be to complete these two priorities by the year 2008.* The last priority for the construction of these improvements will be within residential areas.
>
> In addition to the prioritized locations, the Department will construct individual ramps at specific locations requested by a citizen or organization to provide access to disabled people who frequently use these locations for their typical travel routes. The Department policy is to have these wheelchair ramps constructed within *one month* of a request unless right of way must be acquired. (Emphasis added)

The policy statement does not satisfy the City's affirmative obligations under section 35.150(d)(3), which sets forth "minimum" requirements for a municipality's transition plan.[8] First, it fails to identify by catalogue, inventory, or list the physical obstacles in the City streets which limit the accessibility of the City's programs and activities to those persons like Lonberg who use wheelchairs for mobility. Thus, the plan fails to satisfy section

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[8] The transition plan does comply with section 35.150(d)(2), because it gives priority to walkways serving entities covered by the ADA, and to walkways serving the other areas set for priority by this regulation.

35.150(d)(3)(i)'s requirement that the City "[i]dentify physical obstacles in [its] facilities that limit the accessibility of its programs or activities to individuals with disabilities."

Further, given that "the time period of the transition plan is longer than one year" the plan must (but does not) "identify steps that will be taken during each year of the transition period." Rather, the McGrath memorandum simply states the City's intention to complete curb cuts and other wheelchair related improvements on arterial and commercial streets by the year 2008. *Similarly, the Memorandum does not* indicate when the City's residential streets will be made wheelchair accessible.[9] These failures cause the transition plan to be in violation of section 35.150(d)(3)(iii).

Finally, the plan fails to comply with section 35.150(d)(3)(iv) because it does not identify the individual responsible for implementing the plan. Rather, the McGrath Memorandum states that the Public Works Department will implement major aspects of the plan, and identifies a particular Public Works Department senior engineer as the individual to whom individual requests for curb cut installation should be directed. The plan does not indicate whether this individual-or any other individual-has overall responsibility for ensuring that the plan is actually implemented. This is inadequate.[10]

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[9] The Court does not determine here that the City's residential- or other-streets are not wheelchair accessible at present. Rather, the Court simply concludes that defendant has adopted a curb cut transition plan that requires structural changes to street facilities but it does not comply with certain regulations governing such structurally oriented compliance plans.

Moreover, the fact that the transition plan provides that the City will respond on a site-by-site basis to an individual's or organization's, complaints about specific inaccessible locations used by disabled persons for their typical travel routes does not salvage the policy under section 35.150(d). A similar contention was made and rejected in *Tyler v. City of Manhattan*, 857 F.Supp. 800, 815 (D.Kan.1994) ("A public entity that simply adopts an approach of responding to individual complaints alleging violations of Title II has not gone far enough to affirmatively identify access problems with its services, policies, and practices ....") (holding invalid, under section 35.150(d), a public entity's transition plan for failing to (1) provide a schedule for constructing curb cuts, (2) describe in detail the methods to be employed in bringing city facilities into compliance, (3) identify the steps to be taken each year towards the goal of ADA compliance or (4) designate the public official, "whether by name or title" responsible for plan implementation).

The Court concludes as a matter of law based on the undisputed material facts that defendant has no adequate transition plan within the meaning of section 35.150(d) regarding structural alteration of its street facilities to achieve program accessibility by disabled persons. The evidence offered by defendant in opposition to plaintiff's motion is insufficiently probative to create a genuine issue of material fact for trial on this narrow point, and partial summary judgment will be entered in plaintiff's favor.

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[10] The transition plan does comply with section 35.150(d)(3)(ii), which requires the plan to describe "in detail the methods that will be used to make the facilities accessible ...." The McGrath memorandum makes clear that curb cut style wheelchair ramps will be installed at City intersections.

The bulk of defendant's evidence and legal argument in opposition to plaintiff's motion is directed at establishing a genuine issue of fact whether defendant in fact complies with the substantive anti-discrimination provisions of Title II of the ADA and the implementing regulations. This type compliance is irrelevant to the issue of defendant's compliance with the transition plan requirement of the ADA regulations. Thus, for example, the fact that Lonberg does not identify which of the 700 intersections observed by him to lack curb cuts are owned or controlled by the City does not defeat, or even affect, plaintiff's motion as limited to the transition plan compliance issue.[11] Similarly, the lengthy dispute in

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[11] The Court observes that had City timely complied with the transition plan regulations contained in section 35.150(d), Lonberg, City, and all City residents would have easy access to exactly this information which defendant chides plaintiff for failing to provide. The Court further observes that defendant's contention that "it is clear that the requirements of the ADA apply only if the facilities at issue were either constructed or altered *after* January 26, 1992" is incorrect as a matter of law. Defendant supports this assertion with a citation to section 35.151, the ADA regulation governing new construction. It is the preceding regulation, section 35.150, which governs pre-

[Footnote continued on next page]

the moving, opposing and reply papers concerning curb cut slopes and dueling regulatory schemes is also irrelevant to the issue presented for decision here.

As to this transition plan issue, defendant offers essentially three items of evidence.[12] First, City offers the McGrath Memorandum, which has been analyzed above and fails completely to meet the requirements of section 35.150(d). Second, the City offers certain minutes and other records from meetings of the City's Advisory Committee on Disability Issues (the Committee), on which committee plaintiff Lonberg has served. Defendant seems to argue that these minutes, and the Committee activities documented therein, constitute a valid supplement to its transition plan. Even if the Court considers these minutes and the Committee's activities reflected therein as part of the City transition plan, there is no genuine issue of material fact as to the adequacy of the plan as so supplemented. The Committee's evaluations of the City's facilities, as presented in these documents, do not substitute for the detailed identity obligation and renovation schedule required by section 35.150(d)(3).

Third, the City points to the conclusion reached by

[Footnote continued from previous page]
1992 facilities and governs the transition plan issue presented by the instant motion.

[12] As previously noted, defendant also refers to its "several thousand" page transition plan, which is not provided to the Court, either in actual, or summary form. *See* Fed.R.Evid. 1006.

federal Department of Transportation investigators (the agency), who, in response to complaints made to that agency by Lonberg, evaluated the City's compliance with section 35.150(d) and concluded that City was in compliance with the regulation.

This evidence is insufficient to create a genuine issue of material fact for trial as to the adequacy of defendant's transition plan under section 35.150(d). Although the factual findings contained in this report are admissible under Rule 803(8) of the Federal Rules of Evidence, the legal conclusions contained in the report, including the conclusion that defendant has complied with section 35.150(d), are not admissible. *See Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir.1989) ("Legal conclusions are inadmissible [under Rule 803(8)] because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."); *Zenith Radio Corp. v. Matsushita,* 505 F.Supp. 1125, 1144 (E.D.Pa.1980) ("a finding [under Rule 803(8)] does not include legal conclusions that may have been reached by an investigator"), *rev'd in part on other grounds*, 723 F.2d 238 (3d Cir.1983), rev'd in part on other grounds, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Thus, the agency's factual finding that "[b]ecause there are thousands of ramp locations throughout the City proper and residential areas, the City has targeted areas of the City rather than individual intersections" is admissible to prove the strategy employed by the City. There are, however, no material factual disputes concerning the contents of defendant's transition plan or its strategy chosen for ADA compliance. Rather, the issue for decision is a legal issue-does the City's transition plan comply with the relevant ADA regulations. The Court concludes as a matter of law based on the uncontroverted facts that the plan does not comply, and nothing in the agency's report alters this conclusion.

Furthermore, this case is nothing like *Schonfeld v. City of Carlsbad,* 978 F.Supp. 1329 (S.D.Cal.1997), heavily relied upon by defendant. In *Schonfeld,* the defendant City had prepared a "Sidewalk Inventory Report" and "an index listing every public street in the City and a comprehensive inventory of all existing and missing ramps located within the public right-of-way." *Id.* at 1336. In addition, the defendant City had published a Pedestrian Ramp Inventory, listing 900 locations chosen for curb cut installation or renovation, and had submitted to the Court a four year plan for repairing and installing necessary curb cuts, which included budgetary set asides to fund the planned repairs. *Id.* at 1337. Defendant has submitted no evidence of this sort.

Finally, the Court rejects defendant's contention that "there is at a minimum a genuine issue of material fact as to whether the alterations demanded by plaintiff would impose an undue financial and administrative burden on the City." This contention lacks merit for several reasons. First, defendant fails to address how complying with the *transition plan* regulation at issue in this case would constitute an undue financial or administrative burden. Defendant instead directs its argument at the burden posed by complying with the ADA's substantive anti-discrimination provisions. Thus, defendant's evidence fails to create a genuine issue of material fact as to the burden compliance with section 35.150(d) would impose on it.[13]

Second, the undue burden regulation, section 35.150(a)(3), states that a public entity may prove that compliance with *section 35.150(a)* is unduly burdensome. The regulation does not suggest that such a defense even applies to the transition plan requirement, which is contained in section 35.150(d), not section 35.150(a). The Court concludes that it does not.

Third, even if section 35.150(a)(3) did apply to the transition plan requirement, the regulation requires that the public entity "take any other action that would not result in such ... burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity." If a complete inventory of the City's intersections and curb cuts were somehow unduly burdensome-a proposition for which there is no evidence before the Court-the City was obligated to take whatever action it could to achieve the goals of the transition plan requirement. There is no genuine issue of material fact as to the City's failure to do so.

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[13] Under section 35.150(a)(3), the public entity claiming that compliance would be unduly burdensome bears the burden of proof on this issue.

The Court does not conclude that precise, technical compliance with section 35.150(d) is required for a municipality to avoid being found in violation of the ADA. Indeed, other Courts have expressly held that "substantial compliance" with the ADA regulations is good enough. *See Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers, P.C.*, 950 F.Supp. 393, 399 (D.D.C.1996) ("In practice, the Justice Department has never required more than substantial compliance."); *Tyler*, 857 F.Supp. at 821. Nonetheless, whatever the required degree of compliance with the transition plan regulation, defendant has not achieved it. Thus, the Court concludes as a matter of law based on the uncontroverted facts that defendant is currently in violation of 28 C.F.R. § 35.150(d). Plaintiff's motion for partial summary judgment will be granted.[14]

[V.]
DISPOSITION

IT IS ORDERED THAT:

Plaintiff's John Lonberg's Motion for Partial Summary Judgment is Granted.

[Available at *Lonberg v. City of Riverside*, 2000 WL 34602547 (C.D. Cal. June 12, 2000).]

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[14] Plaintiff has not requested any specific remedy in connection with the instant motion for partial summary judgment, and in particular has not requested injunctive relief be awarded at this time. Accordingly, the Court will order no remedy, other than declaratory relief.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN LONBERG, an individual, *Plaintiff-Appellee*, v. CITY OF RIVERSIDE, a municipal corporation, *Defendant-Appellant*.	No. 06-55781 D.C. No. CV-97-00237-SGL Central District of California, Riverside ORDER

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

Within 14 days, defendant-appellant the City of Riverside, shall file a response to the petition for rehearing en banc. Plaintiff-appellee may reply within 14 days of the response; the reply shall not exceed the length permitted for the response. *See* 9th Cir. R. 40-1.

SO ORDERED.

[Filed July 17, 2009]

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN LONBERG, an individual, *Plaintiff-Appellee,* v. CITY OF RIVERSIDE, a municipal corporation, *Defendant-Appellant.*	No. 06-55781 D.C. No. CV-97-00237-SGL Central District of California ORDER

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

Judges Silverman and Callahan vote to deny the petition for rehearing en banc and Judge Hall so recommends.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc, filed July 10, 2009 is DENIED.

[Filed January 15, 2010]

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No. 09-1259

Supreme Court, U.S.
FILED
JUN 18 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF IN OPPOSITION OF RESPONDENT

◆

TIMOTHY T. COATES, ESQ.
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

GREGORY P. PRIAMOS, City Attorney
NEIL OKAZAKI, Deputy City Attorney
OFFICE OF THE CITY ATTORNEY
CITY OF RIVERSIDE
City Hall, 3900 Main Street
Riverside, California 92522
Telephone: (951) 826-5567
Facsimile: (951) 826-5540
E-Mail: nokazaki@riversideca.gov

GREGORY F. HURLEY
GREENBERG TRAURIG, LLP
3161 Michelson Drive, Suite 1000
Irvine, California 92612
Telephone: (949) 732-6500
Facsimile: (949) 732-6501
E-Mail: ghurley@gtlaw.com

Counsel for Respondent City of Riverside

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition plan regulations, 28 C.F.R. section 35.150(d), are enforceable by a private right of action.

PARTIES TO THE PROCEEDING, JURISDICTION, AND OPINIONS BELOW

Respondent concurs in petitioner's statement as to the parties to the proceeding, jurisdiction and opinions below.

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STATEMENT OF FACTS

Petitioner John Lonberg sued the City of Riverside for violation of the Americans With Disabilities Act ("ADA"). Petitioner contended that the City failed to provide meaningful access to the public rights of way, i.e., sidewalks and streets. As the Ninth Circuit opinion notes, the district court divided the lawsuit into three phases. Phase I, the only phase at issue in this proceeding, concerned petitioner's claim that the City's plan to achieve ADA compliance did not meet the standards set forth in 28 C.F.R. § 35.150(d). The district court granted petitioner's request for a permanent injunction and ordered the City to prepare a transition plan that complies with § 35.150(d). (ER 1, 2.)[1] The City moved for a new trial, arguing for the first time that the ADA did not grant a private right of action and remedy for violation of the regulation in question. The district court denied the motion, finding that the regulation was properly enforceable under the ADA. The City appealed.

On June 26, 2009, the Ninth Circuit issued its published opinion reversing the permanent injunction. The majority opinion held that the ADA did not provide a private right of action or remedy based on a violation of the transition plan regulation. *Lonberg v. City of Riverside*, 571 F.3d 846, 851-52 (9th Cir. 2009).

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[1] Phase II of the case pertains to curb ramps and sidewalks and petitioner's claims of noncompliance with current accessibility regulations as well as damage claims under the California Disabled Persons Act. Cal. Civ. Code § 54.

Judge Silverman dissented on the ground that the City had waived the issue by failing to have asserted it earlier in the litigation. *Id.* at 852-53.[2] Petitioner sought panel rehearing and rehearing en banc, respondent filed opposition, and both panel and en banc rehearing were denied.

◆

SUMMARY OF ARGUMENT

The petition presents no significant issue for review by this Court. There is no meaningful conflict among the circuits, no indication any decision will have an impact on a broad spectrum of cases, and the Ninth Circuit's decision is consistent with the governing authority of this Court.

First, there is no meaningful conflict among the circuits concerning the existence of a private right of action to enforce transition plan requirements under the ADA. The first federal appellate court to consider the issue, the Tenth Circuit, interpreting this Court's then fairly recent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), concluded a private right of action could be brought to enforce transition plan regulations. *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003). Yet, not a single circuit has followed *Chaffin* in the intervening seven years. The Ninth, Sixth, and First Circuits have all concluded that the *Chaffin* court ignored a basic precept of *Sandoval*, i.e., that a federal regulation which imposes obligations over and above those specifically set forth in the authorizing statute, is not enforceable by private right of action. That Congress granted private parties the right to bring actions to eliminate specific barriers to access, does not support a private right of action to compel a public entity to comply with a later regulation requiring transition plans that, in a given case, may have nothing to do with whether or not there are actually barriers to access. *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913-14 (6th Cir. 2004); *Iverson v. City of Boston*, 452 F.3d 94, 101 (1st Cir. 2006); *Lonberg v. City of Riverside*, 571 F.3d 846, 851-52 (9th Cir. 2009).

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[2] Petitioner did not raise the waiver issue on rehearing in the Ninth Circuit and has not raised it in this Court.

Given its orphan status among the appellate courts, and the clear criticism of its decision, it is foreseeable that the Tenth Circuit might well reconsider its position on private enforcement of transition plan regulations. This is especially true given the fact that its earlier decision was rendered without benefit of the thorough analysis of *Sandoval* that has since developed in the other circuits.

Moreover, there is no indication that the issue arises with any frequency in the lower courts. Petitioner cannot point to a multitude of actions awaiting clarification on this issue. Indeed, no published decisions concerning the issue are cited other than the four discussed above. There is nothing to justify this Court's intervention at this time.

Second, the decisions of the Ninth, First, and Sixth Circuits are fully consistent with this Court's decision in *Sandoval*. As noted, in *Sandoval*, the Court made it clear that there was no private right of action to enforce a federal regulation that imposed an obligation over and above that expressly imposed by the statute itself. As the Ninth Circuit here, and the First and Sixth Circuits have recognized, the ADA does not impose any direct obligation on public entities to create transition plans, and the existence of a transition plan has no impact on whether or not there are particular barriers to access in a given municipality. It is possible to have a transition plan yet still have barriers to access. Conversely, a public entity may not have a transition plan, but its facilities may well be free of barriers. Allowing enforcement of transition plan regulations through a private right of action imposes an obligation on local public entities over and above that directly imposed by the ADA. Permitting such enforcement essentially allows the Attorney General through promulgation of regulations, to, in the words of *Sandoval*, play the sorcerer and not simply the apprentice.

At most, petitioner has raised an issue that is the subject of an initial conflict among four appellate courts, with only a single court out of alignment. There is no indication of widespread confusion among the lower courts on any issue that arises with frequency. In time other circuits may weigh in, or the Tenth Circuit may reconsider its initial, and we contend, improvident decision. But at this juncture, there is no need for intervention by this Court.

◆

REASONS WHY CERTIORARI IS NOT WARRANTED

I. REVIEW IS NOT WARRANTED BECAUSE THERE IS NO MEANINGFUL CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING AN ISSUE OF WIDESPREAD IMPORTANCE REQUIRING INTERVENTION BY THIS COURT.

Petitioner contends review is warranted because there is a split among the circuits concerning whether there is a private right of action to enforce the transition plan regulations of the ADA. As noted, only the Tenth Circuit has recognized such a cause of action, and it did so as the first court to even consider the issue. Since that time, three circuits have expressly rejected the Tenth Circuit's analysis, noting that the Tenth Circuit applied only a portion of this Court's decision in *Alexander v. Sandoval*.

Thus, at this point, only four circuits have addressed the issue at hand, and only a single circuit – the very first to consider the issue – has found in favor of a private right of action. And, its analysis has been sharply criticized by subsequent courts as being incomplete. A total of four federal circuit court opinions in the over 20 years since the enactment of the ADA does not suggest a widespread or significant issue that requires resolution by this Court. This is particularly true given that the courts that have considered the issue have been almost uniform, with only a single court finding there to be a private right of action. Given the sharp criticism of the Tenth Circuit's opinion in *Chaffin*, it is not inconceivable that the Tenth Circuit itself, with the benefit of insight from sister circuits over the last four years, might come to a different resolution of the issue.[3] It therefore does not appear that intervention by this Court is necessary at this time.

Moreover, and significantly, petitioner does not point to any great prevalence of this issue in published decisions from the lower federal courts. There is no indication that these claims arise with any sort of ubiquity in the federal trial courts so as to require the intervention of this Court to clarify the law at this point. While petitioner and amici may well want to create a standalone cause of action to compel local public entities to adopt transition plans separate and apart from whether or not there are actual barriers to access or efforts to achieve that end, there is no indication of any sort of widespread attempt to bring similar claims throughout the country.[4] Rather, as the instant case illustrates, at most, the transition plan issue is tangential to a main claim focusing on specific barriers to access.[5]

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[3] The Eleventh Circuit also recently rejected the *Chaffin* court's crabbed interpretation of *Sandoval*. In *American Ass'n of People With Disabilities v. Harris*, ___ F.3d ___, 2010 WL 1855851 (11th Cir. 2010), the court followed *Lonberg*, *Iverson* and *Ability Center* in concluding that under *Sandoval*, there was no private right of action under the ADA to enforce regulations concerning voting machines.

To the extent there is a conflict among the federal appellate courts, it may well be of transient nature, and concerns an issue that does not appear to be rampant among the lower federal courts, however much petitioner and his amici may wish to propagate it. The intervention of this Court is not warranted at this time.

II. REVIEW IS UNWARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE ADA, THE GOVERNING AUTHORITY OF THIS COURT, AND THE WELL REASONED DECISIONS OF OTHER CIRCUITS.

Petitioner seeks review on the ground that the Ninth Circuit erred in concluding there could be no private right of action and remedy for violation of the transition plan regulation. Petitioner argues that the opinion is inconsistent with the general purposes of the ADA as set forth in 42 U.S.C. § 12132 (West

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[4] Amicus curiae Richard M. Skaff refers to a single action he has brought. (*See* Brief of Amicus Curiae Richard M. Skaff in Support of Petitioner at 20.)

[5] In another phase of this litigation, petitioner has brought claims for relief based upon specific purported barriers to access.

2009), and that the opinion is inconsistent with § 203 of Title II of the ADA, 42 U.S.C. § 12133 (West 2009), which authorizes a private right of action to enforce the ADA, as well as § 204, 42 U.S.C. § 12134 (West 2009), which directs the Attorney General to create regulations to "implement" the ADA. Yet, petitioner's argument does not withstand scrutiny and the case does not warrant review.

A. The Ninth Circuit Correctly Joined The First And Sixth Circuits In Concluding That The Plain Language Of The ADA, Interpreted Under The Guiding Principles Of *Alexander v. Sandoval*, Makes It Clear That There Is No Private Right Of Action To Enforce The Transition Plan Regulation At Issue Here.

As the Ninth Circuit's opinion noted, this Court's decision in *Alexander v. Sandoval* "sets forth the framework for determining whether a federal regulation is enforceable through a private right of action." *Lonberg*, 571 F.3d at 849. In *Sandoval*, a class of non-fluent English speakers sued a state department of public safety, alleging that its English-only driver's test violated a federal regulation that barred recipients of federal funding from using criteria or methods that have the effect of subjecting individuals to discrimination because of race, color, or national origin. *Sandoval*, 532 U.S. at 278-79. In reversing an injunction requiring the state to accommodate non-English speakers, the Court held that the regulation in question could not be enforced by a private right of action. *Id.* at 293.

In so holding, the Court noted that the regulation was promulgated as a means to implement § 601 of Title VI of the Civil Rights Act of 1964 which bans recipients of federal funding from intentionally discriminating against individuals on the basis of race, color, or national origin. *Id.* at 278 (citing 42 U.S.C. § 2000d). The Court found that although Congress clearly intended § 601 to be enforceable through a private right of action, the regulation at issue was not subject to private enforcement because the regulation did not merely apply § 601's ban on intentional discrimination, but also "forbid conduct that § 601 permits," in that § 601 did not attempt to reach discrimination based on disparate-impact. *Id.* at 285. Thus, only regulations that effectuated the ban on intentional discrimination could be enforced through a private right of action. To allow enforcement of the regulation would "conjure up a private cause of action that has not been authorized by Congress." *Id.* at 291. As the Court emphasized, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.*

In applying *Sandoval* to determine whether the transition plan regulation, 28 C.F.R. § 35.150(d) is enforceable through a private right of action, the Ninth Circuit focused on the statute it was intended to implement: "§ 202 of Title II of the ADA, which prohibits discrimination by public entities on the basis of disability." *Lonberg*, 571 F.3d at 851. As the court observed, § 202 "provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" *Id.* (quoting 42 U.S.C. § 12132 (1990)).

The court noted that the "plain language of § 202 prohibits public entities from discriminating against qualified disabled individuals in its administration of services and programs" and that this "prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" *Id.* (citation omitted). However, the court correctly observed that "[s]ection 202 says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan." *Id.*

In addition, as the court explained, "nothing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in the private enforcement of section 35.150(d)'s detailed transition plan requirements." *Id.*

The court therefore found that the regulation was not subject to enforcement through a private right of action because there was nothing to indicate that Congress intended private enforcement of a regulation that merely required creation of a plan. As the court explained:

> The existence or non-existence of a transition plan does not, by itself, deny a disabled

> person access to a public entity's services, nor does it remedy the denial of access. Indeed a public entity may be fully compliant with § 202 without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy. Conversely, a public entity may have a transition plan that complies with section 35.150(d), but may still be in violation of section 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access.

Id. at 851-52 (footnote omitted) (citations omitted).

Indeed, as the court emphasized, petitioner's own efforts to enforce the regulation belied any intent to actually eliminate the particular barrier to access, because petitioner initially sought only a declaration that the City's transition plan was inadequate. *Id.* at 851 n.7.

The Ninth Circuit's opinion is consistent with decisions of both the First and Sixth Circuits which, consistent with *Sandoval*, examined § 35.150(d) in light of the specific purposes of the ADA as set forth in § 202. In *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, the Sixth Circuit held that while other regulations that specifically directed removal of particular architectural barriers would be privately enforceable under the ADA, § 35.150(d)'s transition plan regulation was not subject to private enforcement because while "failing to provide curb cuts and other accommodations in the course of altering city streets and sidewalks in violation of [other regulations] denies the disabled meaningful access to public services by perpetuating architectural barriers that impede such access, failing to develop a transition plan in violation of § 35.150(d) does not in and of itself similarly hinder the disabled." 385 F.3d at 913-14. The court emphasized that "there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent a redress." *Id.* at 914. As the court observed: "Indeed, it is conceivable that a public entity could fully satisfy its obligations to accommodate the disabled while at the same time fail to put forth a suitable transition plan." *Id.*

In *Iverson v. City of Boston*, 452 F.3d 94, the First Circuit similarly held there was no private right of action to enforce transition plan regulations. Applying *Sandoval*, the court explained that a regulation "that announces an obligation or a prohibition not imposed by the organic statute may not be enforced under the aegis of a statutory right of action." 452 F.3d at 101 (citing *Sandoval*, 532 U.S. at 284-85). As the court noted, the "dispositive question is whether the regulation either forbids conduct that the statute allows or imposes an obligation beyond what the statute mandates. If that question produces an affirmative answer, the regulation is not privately enforceable." *Id.*

The court in turn held that regulations directing a public entity to conduct a self-evaluation and, if necessary a transition plan, were not enforceable by a private right of action. *Id.* This is because "a municipality's failure to self-evaluate does not in and of itself render municipal services, programs, or activities inaccessible to disabled persons," in that it is "conceivable that a public entity may be in full compliance with Title II without observing the commands of the self-evaluation regulation." *Id.* Because the "regulation imposes a burden on public entities not imposed by Title II itself . . . [it] is not enforceable through the instrumentality of Title II's private right of action." *Id.*

As previously noted, the only circuit to uphold a private right of action for enforcement of transition plan regulations is the Tenth Circuit. In *Chaffin v. Kansas State Fair Board.*, 348 F.3d 850, the court held that the plaintiffs could privately enforce the self-evaluation plan and transition plan regulations because they "simply provide the details necessary to implement the statutory right created by § 12132 of the ADA. They do not prohibit otherwise permissible conduct." 348 F.3d at 858. Yet, as the court noted in *Iverson*, the *Chaffin* court did not correctly apply *Sandoval*. It observed that although the *Chaffin* court "appropriately recognized that 'regulations may not create a private cause of action where no such right was intended by Congress in the statute authorizing promulgation of such regulations,' it inexplicably disregarded *Sandoval's* corollary rule that regulations which impose an obligation beyond the statutory mandate are not enforceable through the statutory right of action." 452 F.3d at 101-02 (citations omitted). The Ninth Circuit here similarly found that *Sandoval* requires "a more particularized review of the challenged regulation than was undertaken by the Tenth Circuit in *Chaffin*, in addition to a determination of whether the regulation effectuates the statutory right and corresponding remedy." *Lonberg*, 571 F.3d at 852.

The *Chaffin* court's analysis is flatly inconsistent with this Court's command in *Sandoval* that regulations cannot create privately enforceable rights beyond those created by the statute itself. As the Ninth Circuit here, the First Circuit and Sixth Circuit have recognized, transition plan regulations impose obligations on public entities over and above those imposed by the substantive provisions of the ADA itself. Hence, under *Sandoval*, they are not enforceable through a private right of action.

B. Neither Section 204 – 42 U.S.C. Section 12134 – Nor Section 203 – 42 U.S.C. Section 12133 – Supports Petitioner's Contention That Congress Intended To Create A Private Right Of Action To Enforce Transition Plan Regulations.

Petitioner contends that in holding that § 202 of the ADA did not evince congressional intent to create a private right of action to enforce transition plan regulations, the panel majority failed to apply § 204 of the ADA, 42 U.S.C. § 12134, which directs the Attorney General to create regulations to "implement" the chapter. According to petitioner, this provision somehow evinces congressional intention to create a private right of action to enforce transition plan regulations enacted by the Attorney General. (Cert. Pet. 14-17.) Specifically, petitioner contends that § 204, 42 U.S.C. § 12134, directs the Attorney General to create regulations implementing the act, further requires that such regulations duplicate those promulgated with respect to the Rehabilitation Act, and that such regulations include those concerning transition plans. *Id.* Petitioner's contention does not withstand scrutiny.

As a threshold matter, petitioner's apparent suggestion that § 204 in and of itself, without reference to § 202, somehow creates substantive rights enforceable in a private right of action under § 203, 42 U.S.C. § 12133, is untenable and directly conflicts with this Court's analysis in *Sandoval*. In finding no private right of action to enforce a particular regulation under Title VI, the Court rejected the plaintiff's contention that a statute directing federal departments and agencies to "effectuate the provisions of [§ 601]" of Title VI evinced congressional intent to create a private right of action to enforce any such regulations, even those that prohibited discrimination beyond that prohibited by § 601. *Sandoval*, 532 U.S. at 288-89. In addition to holding that the regulation in question did not in fact "effectuate" a right created by § 601 because it went beyond discrimination prohibited by that provision, the Court found that § 602's exclusive focus on the obligation of federal agencies as opposed to those subject to regulation or potential beneficiaries dispelled any notion that § 602 created rights subject to a private right of action:

> [T]he focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.

Id. at 289 (citation omitted).

That is precisely the case with § 204 as well – it is directed to the Attorney General, the agent who "will do the regulating." *Id.* It has no substantive rights to enforce other than as defined in the provision, i.e. regulations that "implement" Title II of the ADA as set forth in § 202. *See* ADA § 204, 42 U.S.C. § 12134(a) ["the Attorney General shall promulgate regulations in an accessible format that implement this part"].

Indeed, the language of § 204 is virtually identical to the "authorizing" language at issue in *Sandoval*. There, the question was whether the particular regulation at issue "effectuated" the purposes of Title VI as set forth in § 601. Similarly here, as the Ninth

Circuit recognized, the question is whether the regulation at issue in fact "implements" the purposes of the ADA as set forth in § 202. As noted above, in a detailed and correct analysis, the Ninth Circuit observed that it did not, since the presence or absence of a transition plan had no substantive impact on actual accessibility – a public entity can have a plan but still have barriers to access, or, have no transition plan yet still be fully compliant. *Lonberg*, 571 F.3d at 851-52.

Contrary to petitioner's contention, § 204 simply directs the Attorney General to promulgate regulations that "implement" the right of access encompassed in § 202; the statute does not state that *any* regulation promulgated by the Attorney General "implements" § 202.[6] It cannot be construed as authorizing the Attorney General to create what petitioner and amici attempt to characterize as "rights" to participation and to notice concerning transition plans that, as the Ninth, First and Sixth Circuits have observed, impose obligations that are different than and additional to, the right of access expressly articulated by Congress in § 202. This would, as *Sandoval* noted, impermissibly allow the Attorney General to play the sorcerer, and not merely the apprentice. *Sandoval*, 532 U.S. at 291.

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[6] To paraphrase the Dormouse from Alice in Wonderland, "you might just as well say . . . that I breathe when I sleep is the same thing as I sleep when I breathe. . . ."

Nor, contrary to petitioner's contention, does § 204 expressly reference the particular Rehabilitation Act regulations concerning transition plans, much less specifically evince congressional intent to make such regulations enforceable through a private right of action. In fact, § 204 does not even direct the Attorney General to specifically adopt Rehabilitation Act regulations. Rather, subdivision (a) directs the Attorney General to promulgate regulations "that implement this part," and subdivision (b) simply states that any such regulations "shall be *consistent*" with regulations promulgated with respect to the Rehabilitation Act. 42 U.S.C. § 12134(a)-(b) (West 2009) (emphasis added). "Consistent with" is not the same as "identical to." At most, the provision evinces congressional intent that any regulation that implements the basic rights of the ADA as set forth in § 202 must be consistent, i.e., not conflict with, regulations applicable to facilities under the Rehabilitation Act. Contrary to petitioner's assertion, a requirement that a regulation "implementing" the rights encompassed in § 202 not conflict with federal regulations under the Rehabilitation Act is not the same as saying that regulations under the Rehabilitation Act necessarily implement the ADA.

Not surprisingly, in *Ability Center*, the Sixth Circuit rejected the notion that reference to the general regulatory scheme under the Rehabilitation Act could be interpreted as evincing congressional intent to allow private enforcement of transition plan regulations. 385 F.3d at 914. The court emphasized the absence of any indication that "Congress viewed the creation of transition plans as integral to the achievement of the statute's aims or that Congress considered a public entity's failure to adopt such a plan as a form of discrimination against disabled individuals or as a failure to provide them with meaningful access to public services." *Id.*

As the Ninth Circuit recognized in its decision, the question here was whether the transition plan regulation at issue implemented the core rights of the ADA as set forth in § 202, or imposed different and additional burdens. *Lonberg*, 571 F.3d at 851-52. Consistent with the First and Sixth Circuits, the Ninth Circuit correctly reasoned that under the principles set forth by this Court in *Sandoval*, there was nothing to support the conclusion that Congress intended to create a private right of action to enforce regulations concerning transition plans that simply had no direct impact on the existence or nonexistence of barriers to access. While petitioner is certainly free to pursue, and is in fact pursuing damages under state law and other state and federal remedies in the district court arising from alleged specific barriers to access, there is no private right of action to enforce the transition plan regulation. Because the Ninth Circuit's decision is consistent with the express statutory language, controlling authority of this Court, and the majority of circuits to address the issue, there are no grounds warranting review.

◆

CONCLUSION

For the foregoing reasons, respondent City of Riverside respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully,

TIMOTHY T. COATES, ESQ.
Counsel of Record
GREINES, MARTIN, STEIN
& RICHLAND LLP

GREGORY P. PRIAMOS,
City Attorney
NEIL OKAZAKI,
Deputy City Attorney
OFFICE OF THE CITY ATTORNEY
CITY OF RIVERSIDE

GREGORY F. HURLEY
GREENBERG TRAURIG, LLP

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IN THE

Supreme Court of the United States

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

DON A. ERNST
TERRY J. KILPATRICK
ERNST & MATTISON, APC
1020 Palm Street
San Luis Obispo, CA 93401
(805) 541-0300

JOHN J. BURSCH
Counsel of Record
MATTHEW T. NELSON
AARON D. LINDSTROM
JULIE LAM
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503
(616) 752-2000
jbursch@wnj.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The City of Riverside admits that four U.S. Courts of Appeals have addressed the issue presented in this case and have split on the outcome. Nonetheless, the City argues that the issue presented is not important enough to warrant this Court's attention. The City is wrong. First, this issue—whether a person who has been denied access to a public entity's facilities and services can enforce the entity's duty to identify obstacles to accessibility and develop a plan to remedy them—affects on a daily basis the lives of millions of Americans. Second, as explained below, this issue has been the subject of scores of cases in recent years, including cases in two additional circuits where courts have assumed that the transition-plan regulation *is* privately enforceable. Third, individuals with disabilities in those circuits that deny a private right of action are deprived of a congressionally mandated tool to combat the passive discrimination made unlawful by the Americans with Disabilities Act.

The City's failure to implement a transition plan here illustrates why such plans are necessary: 15 years after the congressional deadline for ADA compliance, the City still has thousands of obstacles impeding access for individuals with disabilities. And yet the City thinks that individuals like Mr. Lonberg should have to bear the burden of identifying those obstacles and litigating them, on an obstacle-by-obstacle basis, to remedy the City's unlawful neglect.

Congress intended a different approach. It was Congress that directed the Attorney General to promulgate regulations consistent with existing Rehabilitation Act regulations, including a transition-plan regulation. While the City erroneously claims that the Attorney General created the right to a transition plan, not Congress, the Attorney General did not add any requirements that were not included in the template that Congress provided in the statutory text itself or, for that matter, take any away. In short, he did not, as the City claims, "play the sorcerer, and not merely the apprentice." City Br. 17.

I. The circuit split furthered by the Ninth Circuit's decision is of substantial importance to millions of Americans with disabilities.

The City admits, as it must, that there is a circuit split as to whether the ADA's transition-plan regulation, 28 C.F.R. § 35.150(d), is enforceable by a private right of action. See, e.g., City Br. 4 (admitting there is a "conflict among four appellate courts"). And while the City claims this is not a "meaningful" circuit split, the issue affects millions of Americans with disabilities: the four circuits that have directly addressed this issue span 23 states and two territories. The outcome of this case will determine whether millions of Americans with disabilities will continue to suffer the very type of passive discrimination that was supposed to end by January 1995. 28 C.F.R. § 35.150(c).

The City further asserts that "there is no indication that the issue arises with any frequency in the lower courts." City Br. 3. That assertion is demonstrably false. Courts in at least two additional circuits have assumed that the transition-plan regulation is privately enforceable, consistent with the Tenth Circuit's decision in *Chaffin* and the district court's decision below. E.g., *Simpson* v. *City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W. Va. 1998) (city had obligation to prepare a transition plan); *Meagley* v. *City of Little Rock*, 2010 WL 1644687, at *2 (E.D. Ark. Apr. 20, 2010) (discussing the enforcement of a consent decree and of transition plans "consistent with federal law").

And the issue has been raised directly and indirectly in a plethora of additional cases. E.g., *Frame* v. *City of Arlington*, 575 F.3d 432, 434 n.1 (5th Cir. 2009); *Ross* v. *City of Gatlinburg*, 113 Fed. App'x 113, 115 (6th Cir. 2004); *Meagley* v. *City of Little Rock*, 2010 WL 1644687, at *2 (E.D. Ark. Apr. 20, 2010); *Southeast Kan. Indep. Living Res. Ctr.* v. *City of Columbus*, 2010 WL 610135, at *1 (D. Kan. Feb. 18, 2010); *Skaff* v. *City of Corte Madera*, 2009 WL 2058242, at *2–*3 (N.D. Cal. Jul. 13, 2009); *Hanebrink* v. *Adams*, 2009 WL 2413155, at *9–*10 (D.S.C. June 5, 2009), *rejected on other grounds*, 2009 WL 2413087 (D.S.C. Aug. 6, 2009); *Littlefield* v. *Kirspel*, 2008 WL 4015743, at *1 (E.D. Ark. Aug. 25, 2008); *Huezo* v. *Los Angeles Cmty. College Dist.*, 672 F. Supp. 2d 1045, 1051–52 (C.D. Cal. 2008); *Californians for Disability Rights, Inc.* v. *California Dep't of Transp.*, 249 F.R.D. 334, 340–41 (N.D. Cal. 2008); *Reichenbach* v. *City of Columbus*, 2006 WL 2381565, at *3 (S.D. Ohio Aug. 16, 2006); *Cherry* v. *City of College of San Francisco*, 2005 WL 2620560, at *2–*3 (N.D. Cal. Oct. 14, 2005); *Deck* v. *City of Toledo*, 76 F. Supp. 2d 816, 822 (N.D. Ohio 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 539–40 (W.D. Ark. 1998); *Simpson* v. *City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W. Va. 1998); *Tyler* v. *Kansas Lottery*, 14 F. Supp. 2d 1220, 1222–23 (D. Kan. 1998); *Schonfeld* v. *City of Carlsbad*, 978 F. Supp. 1329, 1333–34 (S.D. Cal. 1997); *Miller* v. *City* *of Johnson City*, 1996 WL 406679, at *7 (E.D. Tenn. May 29, 1996); *Concerned Parents to Save Dreher Park Ctr.* v. *City of West Palm Beach*, 884 F. Supp. 487, 490 (S.D. Fla. 1994); *Tyler* v. *City of Manhattan*, 857 F. Supp. 800, 820–21 (D. Kan. 1994).

Ironically, the City also claims that usually "the transition plan issue is tangential to a main claim focusing on specific barriers to access." City Br. 7. But this observation simply highlights the need for a transition plan: the fact that individuals with a disability must bring challenges to each individual barrier—that they must litigate on a curb-by-curb basis, rather than simply seeking an injunction requiring a transition plan—defeats Congress's goal of providing a map of the minefield, rather than just providing a person a right to sue after stepping on a mine.

II. Congress expressly created the right to a transition plan; it was not the invention of the Attorney General.

A. Congress directed the Attorney General to adopt the transition-plan regulation to implement the ADA's ban on discrimination.

The City's oft-repeated argument on the merits is that § 12134 "cannot be construed as authorizing the Attorney General to create . . . 'rights'" to a transition plan because this construction would "impermissibly allow the Attorney General to play the sorcerer, and not merely the apprentice." City Br. 17. The City is wrong. The Attorney General did not go beyond Congress's intent and create a new right in the transition-plan regulation. Quite the opposite, the Attorney General could hardly have followed Congress's directions more precisely.

Congress expressly directed the Attorney General to adopt regulations that would implement § 12131 through § 12134. 42 U.S.C. § 12134(a) ("the Attorney General shall promulgate regulations . . . that implement this part"). And in the statutory text, Congress specified the content of those regulations: "With respect to 'program accessibility, existing facilities' . . . , such regulations shall be consistent with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations." *Id.* § 12134(b). The referenced Rehabilitation Act regulations *specifically require transition plans.* In fact, 28 C.F.R. § 39.150(d) is even entitled "Transition plan."

The Attorney General followed Congress's detailed instructions by adopting regulations that were not merely "consistent with" those Rehabilitation Act regulations, but were in fact substantively identical to the regulations that Congress expressly referenced in the text of § 12134. See Pet. 15–17 (side-by-side chart comparing the two sets of transition-plan regulations). And although the City attacks the specificity of § 12134 by claiming that it does not "expressly reference the particular Rehabilitation Act regulations concerning transition plans," City Br. 18, the opposite is true: § 12134(b) expressly requires that regulations "[w]ith respect to 'program accessibility, existing facilities' . . . be consistent with . . . part 39," and the referenced transition-plan regulation, 28 C.F.R. § 39.150, is titled "Program accessibility: Existing facilities."

Furthermore, even though § 12134 gives the Attorney General some discretion by requiring only that the ADA regulations be "consistent with" the Rehabilitation Act regulations, the Attorney General did not exercise that discretion. Instead, the Attorney General hewed strictly to the Rehabilitation Act regulations that Congress cited as a template. The City tries to turn this virtue into a vice by noting that "'[c]onsistent with' is not the same as 'identical to,'" City Br. 18, but the City fails to explain how this distinction could undermine the fact that § 12134 expressly directs the Attorney General to promulgate regulations requiring a transition plan. And this failure is for good reason—the Attorney General followed Congress's intent to the letter. See Pet. 15–17 (chart). Indeed, the City's related complaint—that "the statute does not say that *any* regulation promulgated by the Attorney General 'implements' [§ 12132]," City Br. 17—further highlights that Congress was very specific in § 12134 as to the rights the regulations would create.

B. A private right of action to enforce the transition-plan regulation is consistent with *Alexander* v. *Sandoval*.

The concern of this Court in *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001), "that language in a regulation [might] conjure up a private cause of action that has not been authorized by Congress," is not present here. Section 12134 expressly states that the transition-plan regulation implements the right of individuals with a disability to be free from discrimination, and § 12133 authorizes a private right of action to enforce that right.

The City attempts to overcome this statutory language by arguing that "the language of [§ 12134] is virtually identical to the 'authorizing' language at issue in *Sandoval*." City Br. 16. This is wrong. The statutory language at issue in *Sandoval*, § 602 of Title VI, directed each federal department to issue regulations "to effectuate the provisions of section 2000d [i.e., § 601] . . . which shall be *consistent with the achievement of the objectives of the statute*," 42 U.S.C. § 2000d-1 (emphasis added), which this Court interpreted as "prohibit[ing] only intentional discrimination." *Sandoval*, 532 U.S. at 280. That is why this Court held in *Sandoval* that a regulation prohibiting *un*intentional discrimination (i.e., disparate-impact discrimination) went beyond Congress's expressed intent. *Sandoval*, 532 U.S. at 293. In stark contrast, § 12134(b) directs the Attorney General to adopt regulations "consistent with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations," which incorporates the requirement of a transition plan designed to promote the accessibility of existing facilities. 42 U.S.C. § 12134(b). That direct reference should be the end of the discussion, as the City does not (and cannot) argue that the ADA transition-plan regulation is inconsistent with the regulations Congress cited.

Congress's intent to create a private right of action under § 12134 is affirmed by the legislative history. Specifically, the House Report that accompanied the ADA states that the rights, remedies, and procedures available under section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which include a private right of action) "'shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of a disability in violation of any provisions of this Act, *or regulations promulgated under section 204*, concerning public services.'" *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 912 (2004) (quoting H.R. Rep. No. 101-485, pt. 2, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381, and adding emphasis).

The City also never disputes that § 35.150(d) is promulgated to implement §§ 12131 through 12134, and not just § 12134. As explained in the petition, the Attorney General stated in § 35.101 that the purpose of the ADA regulations—including § 35.150—is to effectuate the ADA's prohibition on discrimination on the basis of disability. Pet. 14–15; see also *Ability Center*, 385 F.3d at 906 (citing § 35.101 and stating that § 35.151 "was promulgated pursuant to [§ 12134] to effectuate [§ 12132]"). That interpretation is entitled to *Chevron* deference and provides an additional reason to recognize the existence of a private right of action.

C. The First and Sixth Circuits' analysis cannot be reconciled with the statutory text.

Despite the foregoing, the City argues that the decisions of the First and Sixth Circuits demonstrate that the Ninth Circuit reached the correct conclusion. But neither of those decisions can be reconciled with § 12134's plain language.

The Sixth Circuit's decision in *Ability Center* is unpersuasive for two reasons. First, the Sixth Circuit rejected the argument that § 12134 requires public entities to adopt a transition plan not because of the language of the statute, but because of the consequences: "it would follow that all Rehabilitation Act regulations incorporated through Title II would be enforceable through private causes of action, regardless of whether they are even privately enforceable under the Rehabilitation Act and regardless of whether Title II indicated in any other way"—i.e., other than the plain text of

§ 12134—"that it intended to impose the obligation or prohibit the conduct at issue." *Ability Center*, 385 F.3d at 914. But whether a parallel Rehabilitation Act regulation is privately enforceable is a separate question that turns on the language of that Act. What determines whether the ADA regulations are privately enforceable is the language of the ADA. And the Sixth Circuit had no authority to require Congress to state its intent in a second, "other way," when Congress had already spoken clearly in § 12134. In short, the fact that the Sixth Circuit disagreed with the outcome dictated by the plain language did not give it license to deviate from what Congress said. See *Dodd* v. *United States*, 545 U.S. 353, 359 (2005); *Tyler* v. *Cain*, 533 U.S. 656, 663 n.5 (2001) ("[E]ven if we disagreed with the legislative decision . . . we do not have license to question the decision on policy grounds.").

Second, the Sixth Circuit's decision in *Ability Center* is internally inconsistent, as it holds that "plaintiffs do have a private cause of action against defendants for failing to comply with 28 C.F.R. § 35.151"—the regulation immediately following the § 35.150 transition-plan regulation. 385 F.3d at 913. In reaching that conclusion, the Sixth Circuit correctly reasoned that "[o]ther portions of Title II make clear that 28 C.F.R. § 35.151 imposes requirements *specifically envisioned by the statute*." 385 F.3d at 910 (emphasis added). To support that point, the Sixth Circuit relied on the very language in § 12134(b) that controls here: "For instance, Title II states that, with respect to regulations that affect program accessibility and existing facilities, 'such regulations shall be consistent with regulations and analysis as in [28 C.F.R. § 39.101 *et seq.*], applicable to federally conducted activities under [§ 504 of the

Rehabilitation Act]." *Id.* (quoting § 12134(b)) (alterations in original). Thus while the Sixth Circuit correctly applied § 12134 with respect to one regulation (§ 35.151), it refused to apply the same statutory language with respect to the transition-plan regulation (§ 35.150(d)), even though there is no textual reason to treat the two adjacent regulations differently.

Neither the First Circuit's reasoning in *Iverson* v. *City of Boston*, 452 F.3d 94 (1st Cir. 2006), nor the Ninth Circuit's decision below in this case improves on *Ability Center*'s faults. In fact, the First Circuit, like the Ninth Circuit here, never analyzed § 12134, even though the statute specifically requires transition plans. See *id.* at 99–102 (mentioning § 12134 once in passing).

D. The transition-plan requirement is triggered only if a public entity must undertake structural changes to public facilities to comply with the ADA.

Finally, the City makes a policy argument that no private right of action should exist because "a public entity may not have a transition plan, but its facilities may well be free of barriers." City Br. 4; see also *id.* 10–11, 12, & 13. But as explained in the petition, "the transition-plan regulation *does not apply* when a public entity is fully compliant: a transition plan is necessary only '[i]n the event that structural changes to facilities will be undertaken to achieve program accessibility.'" Pet. 21 (quoting 28 C.F.R. § 35.150(d)) (emphasis added). The City never explains why the plain text of the regulation does not answer this concern.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Don A. Ernst	John J. Bursch
Terry J. Kilpatrick	*Counsel of Record*
Ernst & Mattison, APC	Matthew T. Nelson
1020 Palm Street	Aaron D. Lindstrom
San Luis Obispo, CA 93401	Julie Lam
(805) 541-0300	Warner Norcross & Judd LLP
	900 Fifth Third Center
	111 Lyon Street N.W.
	Grand Rapids, MI 49503
	(616) 752-2000
	jbursch@wnj.com

Counsel for Petitioner

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In The
Supreme Court of the United States

◆

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS ADVOCATES AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. IN SUPPORT OF PETITIONER

◆

LINDA D. KILB
DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND, INC.
2212 Sixth Street
Berkeley, CA 94710
(510) 644-2555

LAURENCE W. PARADIS
DISABILITY RIGHTS ADVOCATES
2001 Center Street, 3rd Floor
Berkeley, CA 94704
(510) 665-8644

ANDREW J. DHUEY
Counsel of Record
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200
ajdhuey@comcast.net

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition plan regulations, 28 C.F.R. § 35.150(d), are enforceable by private right of action.

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BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS ADVOCATES AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

This case presents whether persons with disabilities have a private right of action to force public entities to comply with the transition plan requirement of the Americans with Disabilities Act ("ADA"). That is an issue of grave concern to *amici* – disability rights organizations well-aware of the substantial and inevitable physical barriers to access persons with disabilities face when public entities neglect to identify access problems and create a plan to resolve them.

The predictable result of a public entity's failure to prepare and implement a transition plan is that access barriers in existing facilities will not be corrected proactively as required by the ADA. Instead, such barriers will go unidentified and uncorrected until persons with disabilities encounter the barriers, are denied access to a public entity's programs, services and activities as a result, and then face the lengthy process of petitioning governmental officials, and, if necessary, suing the public entity under the ADA to remove the barrier. By requiring public entities to self-identify barriers to access and plan for their removal, Congress meant to avoid subjecting people with disabilities to denials of access in the first place. *Amici* hope that the Court will affirm the right of persons with disabilities to enforce the congressional demand of a transition plan requirement. As discussed below, Congress clearly expressed its intent that the requirements it imposed under the ADA be broadly enforceable by private litigants.

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[1] Pursuant to the Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record for both Petitioner and Respondent were timely notified of the intent to file this brief and the parties' written consents to the filing of this brief have been filed with the Clerk's office.

Amicus curiae Disability Rights Advocates ("DRA") is a nonprofit public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. Based in Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities.

Amicus curiae Disability Rights Education and Defense Fund ("DREDF") is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the disability community. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

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REASONS FOR GRANTING THE PETITION

This case presents issues of tremendous importance to all persons with disabilities. In the decision below, the Ninth Circuit held that there is no private right of action to enforce the ADA's transition plan requirement. Such a private right of action exists for persons with disabilities in the Tenth Circuit, but not for those in the First, Sixth and now, Ninth Circuits.[2] This is precisely the sort of outcome-determinative conflict among the courts of appeals the Court seeks to resolve.

The deadline set by the ADA for public entities to develop a transition plan was 1992.[3] The sad reality, however, is that scores of public entities nationwide have disregarded their obligation to create a transition plan. The U.S. Department of Justice, Civil Rights Division lists noncompliance with the transition plan among "common problems" with ADA compliance. *The ADA and City Governments: Common Problems* (Oct. 9, 2008), available at http:www.ada.gov/comprob.htm. Producing reliable data on transition plan noncompliance is challenging, since as the National Council on Disability observed, "[d]ata collection on ADA compliance efforts [is] difficult" and "[r]ecords of adoption of, and progress on, transition plans are de-centralized." *The Impact of the Americans with Disabilities Act: Assessing the Progress Toward Achieving the Goals of the ADA* 23 (Jul. 26, 2007), available at http://www.ncd.gov/newsroom/publications/2007/ada_impact_07-26-07.htm. Still, *amici*'s experience is the same as the Civil Rights Division's: noncompliance with the transition plan requirement is common and widespread.

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[2] *See Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004); *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003).

[3] 28 C.F.R. § 35.150(d)(1).

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ARGUMENT

I. SUMMARY.

In enacting Title II of the ADA, Congress made two explicit statutory cross-references and incorporations that unequivocally govern this case: (1) it mandated that the regulations promulgated to define and implement the ADA must be consistent with previous regulations under Section 504 of the Rehabilitation Act of 1973, and (2) it mandated that Section 504 remedies must be available to enforce Title II. *See* 42 U.S.C. §§ 12134 and 12133. The cross-referenced Section 504 regulations have for decades prior to the

ADA explicitly included a transition plan requirement, and the incorporated remedies provide for a private right of action. Moreover, the Court has previously held that the long-standing Section 504 regulations (which include explicit transition plan requirements) have been codified by Congress. Accordingly, congressional action and intent in explicitly modeling ADA Title II on Section 504 establish that ADA Title II includes a transition plan requirement that is enforceable by private right of action. *Amici* further agree with Petitioner that a correct application of the principles laid out in the Court's *Sandoval* and *Chevron* decisions would also confirm this remedy.[4] However, analysis under *Sandoval* and *Chevron* is not needed given the unique and definitive statutory structure and legislative history of Section 504 and ADA Title II.

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[4] *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. ADA TITLE II IS PROPERLY UNDERSTOOD TO INCLUDE A TRANSITION PLAN REQUIREMENT.

A. By Explicitly Cross-Referencing Previous Section 504 Regulations that Include a Transition Plan Requirement, Section 12134 Creates a Clear Congressional Mandate for ADA Title II Transition Plans.

On the merits, the question presented is neither close nor complex. The ADA provides *in the language of the statute* that Title II regulations must be consistent with those promulgated under the Rehabilitation Act:

> **Relationship to other regulations**
>
> Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. *With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations*, applicable to federally conducted activities under section 794 of title 29.

42 U.S.C. § 12134(b) (emphasis added).[5] Included among these "part 39" Rehabilitation Act regulations was an explicit transition plan requirement. 28 C.F.R. § 39.150(d). A fundamental canon of statutory construction is to start with the plain meaning of the words of a statute. Here, those words were clear as a bell: the Title II regulations to be developed by the U.S. Department of Justice ("DOJ") must be consistent with the existing Section 504 regulations. The ADA regulation requiring a transition plan (28 C.F.R. § 35.150(d)) thus is not merely an administrative interpretation of the statute – it is better described as a regulation required by Congress itself. Had the ADA regulations not included the affirmative transition plan requirement of the Rehabilitation Act regulations, they would have been unlawfully *in*consistent with 42 U.S.C. § 12134(b).

While the Ninth Circuit ignored 42 U.S.C. § 12134(b) in the decision below, the Sixth Circuit acknowledged this subsection's significance: "Plaintiffs' best potential argument for an implied obligation might be that, by mandating the adoption of program accessibility regulations consistent with

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[5] The preceding subsection, 42 U.S.C. § 12134(a), provides explicit statutory authority for the U.S. Department of Justice to issue Title II ADA regulations, authority that was exercised in the promulgation of 28 C.F.R. Part 35. By directing in subpart (b) of the Title II provision at issue (42 U.S.C. § 12134) that the DOJ regulations be consistent with those already existing under Section 504, Congress mandated the substance of the Title II regulations to be developed.

Rehabilitation Act regulations * * * Title II does contemplate that public entities are required to adopt transition plans." *Ability Ctr. of Greater Toledo*, 385 F.3d at 914.[6]

While the Sixth Circuit erred in its holding, it was correct in highlighting the paramount importance of the ADA's interactions with the Rehabilitation Act. Because the Title II statute mandated consistency with previous Section 504 regulations that included explicit transition plan requirements, the text of Section 12134 is, in itself, sufficient to confirm that Congress intended Title II to require public entities to prepare and implement transition plans for their existing facilities.

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[6] Nonetheless, the Sixth Circuit refused to recognize a private right of action to enforce the transition plan requirement. To do that, the Sixth Circuit would require a "stronger, more explicit indication from the statute itself that Congress viewed the creation of transition plans as integral to the achievement of the statute's aims or that Congress considered a public entity's failure to adopt such a plan as a form of discrimination against disabled individuals or as a failure to provide them with meaningful access to public services." *Ibid.* The Sixth Circuit went astray, however, in ignoring the plain meaning of the terms of the ADA statute. Moreover, as discussed below, the congressional "endorsement" of Section 504 regulations provides any necessary confirmation that Congress views *all* aspects of those regulations – including the transition plan requirement – as integral to its ADA statutory purpose.

B. The Court Has Already Confirmed Clear, Long-Standing Congressional Intent to "Endorse" the Previous Section 504 Regulations that Are Cross-Referenced in Section 12134.

Since 1978, the general congressional Section 504 nondiscrimination mandate on which ADA Title II was modeled has been properly understood to include *all* of the detailed requirements set out in original Section 504 regulations – including a transition plan requirement. As recognized by the Court, Congress effectively acted over three decades ago to "endorse" these regulations.[7]

As originally enacted in 1973, Section 504 of the Rehabilitation Act established a disability nondiscrimination mandate in broad and general language. *See* 29 U.S.C. § 794, Pub. L. 93-112, 87 Stat. 355, 394 (1973). If this text was the *only* thing available to aid in interpretation of that mandate, there perhaps might be a question as to whether a transition plan requirement is appropriately included within its sweep. But this general 1973 mandate was subsequently defined *with particularity* in Section 504 regulations that were themselves – in the words of the Court – subsequently "endorsed" and "codified" by Congress. *See Consolidated Rail Corp. v. Darrone* ("*Conrail*"), 465 U.S. 624 at 632, 636. This series of developments is clearly evident from examination of Section 504 legislative history, as confirmed in high court jurisprudence.[8]

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[7] The Court has emphasized the need to examine legislative history when faced with questions concerning the scope of Section 504 and its remedial provisions, and has consistently refused to interpret Section 504 as containing limitations inconsistent with clear congressional purposes. As the Court stated in *Consolidated Rail Corp. v. Darrone ("Conrail")*, 465 U.S. 624, 633 n.12 (1984), "language as broad as that of § 504 cannot be read in isolation from its history and purposes."; *see also Alexander v. Choate ("Choate")*, 469 U.S. 287 (1985).

As recounted by the Court in *Conrail*, the then-existing U.S. Department of Health, Education and Welfare ("HEW") was "the agency designated by the President to be responsible for coordinating enforcement of § 504." 465 U.S. at 632 (*citing* Exec. Order

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[8] In *Conrail*, the Court based on legislative history held that Congress had not intended to incorporate into Section 504 the employment limitation of Section 604 of Title VI of the Civil Rights Act of 1964. In *Choate*, the Court addressed the question of whether Section 504 prohibited disparate-impact discrimination. Despite the holding of a majority of the Court in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that Title VI itself did not prohibit disparate-impact discrimination, the *Choate* Court declined to extend this limitation on the scope of Title VI to Section 504, again basing decision on the legislative history of Section 504.

Subsequent to both *Guardians* and *Choate*, of course, the Court again addressed the issue of disparate impact in *Sandoval*. But *Sandoval*, like *Guardians*, was focused on Title VI, and thus must be carefully examined to determine whether and how it might apply to a Section 504 context. Regardless, given the explicit congressional endorsement of Section 504 regulations contained in 42 U.S.C. § 12134(b), there is no need to even reach *Sandoval* questions here, or to conduct an analysis of rulemaking authority pursuant to *Chevron*.

No. 11914 (1976)). The *Conrail* Court noted that these original HEW regulations "particularly merit deference" because "the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself *endorsed the regulations in their final form*." *See Conrail*, 465 U.S. at 632 (emphasis added); *see also* 465 U.S. at 635 (noting congressional action to "codify" the specific regulatory provision at issue in *Conrail*). As promulgated in 1977, the original HEW Section 504 regulations expressly included a transition plan requirement. *See* former 45 C.F.R. § 84.22(e), 42 Fed. Reg. 22681 (May 4, 1977).[9]

Conrail was decided in 1984. In the years since then, Congress has *repeatedly* acted to reauthorize and amend Section 504.[10] In *none* of those actions has

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[9] In 1979 HEW was split into two separate agencies, the U.S. Department of Health and Human Services and the U.S. Department of Education. Following this split, coordinating authority for the development of Section 504 regulations passed to the DOJ, where it remains. *See* Exec. Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980). Thus, when Congress passed the ADA in 1990, it looked to DOJ regulations to provide Section 504 definition. But those DOJ regulations – in the form of both the "part 41" and "part 39" promulgations referenced by ADA Section 12134 - simply repeat the detailed requirements contained in the original HEW regulations that the Court acknowledges were "endorsed" by Congress. Thus, that original regulatory detail gives meaning to the Title II nondiscrimination mandate itself.

[10] In addition to the Section 504 amendments accomplished by the ADA in 1990, significant Section 504 amendments include the Civil Rights & Remedies Equalization Act of 1986, Pub. L.

(Continued on following page)

it objected to the Court's characterization in *Conrail* of a congressional "endorsement" of Section 504 regulations.

III. CONGRESS CLEARLY PROVIDED FOR AN EXPANSIVE PRIVATE RIGHT OF ACTION TO ENFORCE ADA TITLE II.

In the first set of amendments to the Rehabilitation Act in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action."[11] This congressional commitment to a Section 504 judicial enforcement scheme was reaffirmed in 1978, with the incorporation of Title VI remedies into the Rehabilitation Act.[12] This was, notably, the *same* legislation that accomplished the congressional endorsement of Section 504 regulations that has been acknowledged by the Court. *See Conrail*, 465 U.S. at 632, 635.

99-506, 100 Stat. 1807 (Oct. 21, 1986); the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (Mar. 22, 1988); the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (Oct. 29, 1992).

[11] S. Rep. No. 1297, 93rd Cong., 2d Sess., 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6390. Specifically, these amendments were accomplished through the enactment of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1617 (Dec. 7, 1974).

[12] *See* Section 505(a)(2), 29 U.S.C. § 794a(a)(2), as added by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955 (Nov 6, 1978).

Title VI remedies are, of course, relevant to the ADA, given the incorporation of Title VI into Section 504, and the further incorporation of Section 504 remedies into ADA Title II. *See Barnes v. Gorman*, 536 U.S. 181, 185 (2002). But the Court has recognized that in analyzing any remedial incorporation, "we evaluate the state of the law when the legislature passed" the statute in question. *See Franklin v. Gwinett County*, 503 U.S. 60, 71 (1992).

As the *Franklin* Court noted, in enacting and amending the nondiscrimination laws of the 1960s and 1970s, Congress legislated against the backdrop of a clear and long-standing "traditional presumption in favor of all appropriate relief," as well as an assumption that legislative history would be taken into account in assessing available remedies.[13]

Such history is indeed instructive as to both Section 504 and the ADA Title II. In enacting both statutes, and in amending Section 504, Congress expressed its clear intent to create very broad remedial rights. This is confirmed in the legislative history addressing the remedial provisions set out in Section 205 of the ADA, 42 U.S.C. § 12131:

> Section 205 incorporates the remedies, procedures and rights set forth in Section 505 of

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[13] *Ibid. See also Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975) (identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

> the Rehabilitation Act of 1973. * * * The Rehabilitation Act provides a private right of action, with a *full panoply of remedies* available, as well as attorney's fees. [fn].

H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 1990, *reprinted in* 1990 U.S. Code Cong. & Admin. News 445, 475 (emphasis added).

A "full panoply of remedies" is broad remedial language, as the Court has recognized in another context.[14] Moreover, in the passage quoted above, the committee cited (in the footnote in the passage above, no. 62 in original) a single case to illustrate the remedial structure of the Rehabilitation Act: *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982).

It would be difficult to find a case with a more expansive view of private rights of action available to persons with disabilities than *Miener*. There, the court interpreted the remedies under the Rehabilitation Act broadly to provide all ordinary remedies necessary to right a wrong, including an implied right to seek damages. *Id.* at 978 ("We indulge the presumption * * * that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable"). Furthermore, the court held that a person with disabilities need not exhaust administrative remedies prior to bringing suit under the Rehabilitation Act. *Ibid.* On a variety of remedial issues, the *Miener* court observed substantial divisions of authority in the circuit courts, and sided each time in favor of expansive private enforcement rights for persons with disabilities. *Id.* at 975-78.

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[14] *See, e.g., Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 n.11 (1999) (Court viewed House committee's intent to provide the "full panoply of remedies provided in the patent law" as evidence of congressional intent to create broad remedial rights.).

Since Congress expressed its intent to provide persons with disabilities a "full panoply of remedies" to enforce their rights under the ADA, and embraced *Meiner* for its broad holdings regarding remedies, there can be no doubt that Congress intended to provide a private right of action to enforce the ADA Title II requirements, including the transition plan requirement which was legislatively mandated under 42 U.S.C. § 12134(b).

Failure by a public entity to comply with the transition plan requirement is unquestionably a "wrong" against persons with disabilities, who are the intended beneficiaries of the transition plan requirement. Righting that wrong is a simple matter of mandating that public entities comply with federal law. To that end, Congress has established a clear path to compliance by enacting the Title II nondiscrimination mandate, explicitly cross-referencing it to long-standing Section 504 regulations, and providing for enforcement through an unquestionably expansive remedial scheme. The Court should take this case to confirm this clear statutory mandate and require all Circuits to implement what Congress intended.

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CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

ANDREW J. DHUEY
Counsel of Record
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200
ajdhuey@comcast.net

LINDA D. KILB
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.
2212 Sixth Street
Berkeley, CA 94710
(510) 644-2555

LAURENCE W. PARADIS
DISABILITY RIGHTS ADVOCATES
2001 Center Street, 3rd Floor
Berkeley, CA 94704
(510) 665-8644

Counsel for Amici Curiae

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In The

Supreme Court of the United States

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JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* RICHARD M. SKAFF IN SUPPORT OF PETITIONER

◆

ANDREW J. DHUEY
Attorney at Law
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200

CHARLES G. WENTWORTH
Counsel of Record
WENTWORTH LAW OFFICES P.C.
460 N. Main Street, Suite 204
Glen Ellyn, IL 60137
(630) 469-9600
charles@wentworthlawoffices.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

This case presents the Court with an opportunity to recognize that 28 C.F.R. § 35.150(d)(1) creates a private right of action in individuals to enforce its requirement that public entities establish Self-Evaluation and Transition Plans. Such a holding would resolve a mature circuit split between the First, Sixth, and now Ninth Circuits on the one hand, and the Tenth Circuit on the other.

The resolution of this question is incredibly important to *amicus* Richard M. Skaff because of his many roles as a leader in the business community, as a public official, as an advocate for disability rights, and as an individual with disabilities who has had to bring suit himself to enforce the ADA's requirements in the jurisdictions where he lives and works. Failure to address the split will mean that individuals with disabilities residing in the First, Sixth, and Ninth Circuits will be forced to litigate enforcement of the ADA's requirements on an after-the-injury, curb-by-curb basis rather than a preemptive change that would affect global changes throughout the offending jurisdictions.

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2, *amicus*' counsel of record gave each party's attorney at least ten days' written notice of the intent to file this brief, and the parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office.

As a former mayor and town council member, a leader in the business community, the director of a disability-access non-profit corporation, and a paraplegic, Mr. Skaff is uniquely qualified to address the issues facing both public entities *and* individuals with disabilities.

Mr. Skaff's business leadership began in the 1970s when he managed a large 250-seat restaurant on Fisherman's Wharf in San Francisco and served on the Board of the Golden Gate Restaurant Association. He later spent five years as the Executive Director of the Fisherman's Wharf Port Tenants Association.

In 1981, Mr. Skaff was elected to the Town Council of Corte Madera, California, and later served as Mayor until 1985. During that time, he served on the Marin County Council of Mayors and Council Members, as the founder and Chairperson of the Ross Valley Paramedics Authority (County of Marin), and as Program Developer for Access Marin. In that last position, he consulted with City, County, and State building departments, as well as other State and local agencies, architects, engineers, and individuals with disabilities to ensure that these entities were compliant with the ADA's mandates.

Later, he was hired by Mayor Diane Feinstein to create a new program for the San Francisco Bureau of Building Inspection and assure its enforcement of California Building Code access requirements. He was appointed as a Chief Building Inspector for the City's Bureau of Building Inspection and was responsible for the Bureau's enforcement of State access codes. He also did plan and site review of public and private projects, trained Building Inspectors and Public Works personnel, including architects, engineers, and project managers, and represented the City on the State Architect's Advisory Committee creating State access codes.

Mr. Skaff then became the Disability Access Coordinator for the San Francisco Department of Public Works, taking responsibility to see that the required access features were included in the design and construction of the City's public buildings and facilities.

In 1998, at the request of Mayor Willie Brown, Mr. Skaff opened the Mayor's Office on Disability as the Deputy Director. While there, he oversaw the development and implementation of the City's Self-Evaluation and Transition Plan. He also managed the resolution of public complaints regarding physical accessibility within City facilities, provided plan and site review of all new and remodeled City-funded or owned facilities, and participated in multiple State and Federal code committees. Among these were three of the U.S. Architectural and Transportation Barriers Compliance Board Advisory Committees, including recreation, vessel access, and public rights-of-way.

While working for the City, Mr. Skaff travelled to New York City to give testimony before its Housing and Building Committee about the effect of building and other safety codes on people with disabilities. He continued serving in the Mayor's Office until 2004, when he retired.

All of these public-sector achievements came after Mr. Skaff became a paraplegic as a result of a fall in 1978, leaving him paralyzed below the waist and necessitating that he use a wheelchair for mobility. Shortly after his accident, Mr. Skaff founded the Marin Center for Independent Living (now one of 28 such independent living centers in California) where he oversaw efforts to create accessible communities in Marin County and its eleven cities. In 2006, after retiring from the City of San Francisco, Mr. Skaff founded Designing Accessible Communities, a nonprofit organization dedicated to creating universally accessible environments. He currently serves as the organization's Executive Director.

Mr. Skaff's experience as a business person, a civil servant, a director of multiple non-governmental organizations, and a person with a disability gives him a unique understanding of both the implications of State and Federal regulations as they relate to people with disabilities, and the effective implementation of regulations in public and private buildings and facilities. He has developed access code training for major U.S. cities, written City-wide access policies, and resolved public complaints regarding physical accessibility. And he has created and presented code and regulatory trainings throughout the United States, including in Baton Rouge at the request of the Louisiana Governor's Office shortly after Hurricane Katrina.

Mr. Skaff has also traveled extensively to lecture on accessibility and disability rights, presenting training materials about access, public rights-of-way, and emergency-related issues to groups in Japan, Portugal, and Ecuador, locales that previously had no regulations requiring physical access or the protection of the rights of individuals with disabilities. His input was instrumental in the creation of new access laws and policies in those countries.

Finally, Mr. Skaff has, on multiple occasions, had to personally bring suit to enforce the ADA's requirements to allow him access to public spaces, even in municipalities where he once served as an elected official. He is thus personally familiar with the roadblocks – both figurative and literal – that public entities place in the way of persons with disabilities.

It is with this background that Mr. Skaff urges the Court to grant the Petitioner's request and issue the writ of certiorari to the Ninth Circuit Court of Appeals.

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REASONS FOR GRANTING THE PETITION

The Ninth Circuit panel below has already acknowledged that its opinion, as well as those of the First and Sixth Circuits, is squarely in conflict with that of the Tenth Circuit regarding the enforceability by a private individual of the ADA's transition-plan regulations. Pet. at 11-21 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009); *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003)). And the Eleventh Circuit recently reached a similar result as the First, Sixth, and Ninth Circuits, albeit with respect to a different regulation. *American Assoc. of People with Disabilities v. Harris*, Case No. 07-15004, ___ F.3d ___ (11th Cir., May 11, 2010), *available at* http://www.ca11.uscourts.gov/opinions/ops/200715004.pdf [hereinafter "*Harris* Slip Opinion"] at 12-27 (holding that 28 C.F.R. § 35.151(b) does not create private right of action).

Rather than repeating that analysis, Mr. Skaff argues that the establishment of a Self-Evaluation and Transition Plan is the only way to affect the meaningful changes anticipated, and required, by the ADA. He gives specific examples of how the existence (or lack of) a transition plan has affected his own efforts to make changes in public entities, both from inside the system as a public official, and from the outside as an individual with disabilities and a plaintiff in ADA litigation.

Unless individuals are allowed to bring private rights of action to require that public entities adopt transition plans, the ADA's non-discrimination goals will be frustrated. Plaintiffs will be forced to litigate on after-the-injury, curb-by-curb bases rather than compelling public entities to preemptively interact with the disability community, enabling public officials to understand what must be done to comply with the ADA's mandates, and thereby create plans that address those needs globally. The Court should therefore grant Petitioner's request for a writ of certiorari to resolve the circuit split.

I. Compliance with the ADA's Requirements by Public Entities Is Virtually Impossible Without the Establishment of a Proper Self-Evaluation and Transition Plan.

The Ninth Circuit erred when it speculated that the "existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services." *Lonberg*, 571 F.3d at 851. Quite to the contrary, and as the DOJ's Civil Rights Section recognizes, "When self-evaluations are not conducted and transition plans not developed, city governments are ill-equipped to implement accessibility changes required by the ADA." *The ADA and City Governments: Common Problems* (Oct. 9, 2008), *available at* http://www.ada.gov/comprob.htm. In other words, unless a public entity has a complete assessment of its facilities, services, and programs, it is impossible for the entity to effectively plan, budget, and prepare for the changes necessary to meet the ADA's requirements. *See id.* Without a Self-Evaluation and Transition Plan, "people with disabilities cannot participate or benefit from the city's services, programs, and activities." *Id.*

Most importantly, the creation of a transition plan forces public entities to review their properties, facilities, and programs so that they know what they have. Transition plans are not only there to protect the rights of individuals with disabilities. They are also necessary for the public entities to protect themselves from future litigation by identifying areas of improvement and forcing the entities to create a plan to address those shortfalls. Only after a plan has been completed can an entity demonstrate that it is in fact complying with the ADA's mandates.

It is for these reasons that the regulations required public entities to adopt Self-Evaluation and Transition Plans *by January 26, 1993*. 28 C.F.R. § 35.150(d)(1). But as of yet, only a very small portion of jurisdictions have taken the time necessary to develop a plan adequate to address the needs of their communities.

At the time the ADA was adopted, the Attorney General knew that these plans would be necessary "[i]n the event that structural changes to facilities [were] undertaken to achieve program accessibility." *Id.* In anticipation of this, the regulations mandated that transition plans contain, "at a minimum," the following four parts:

- Identification of physical obstacles limiting accessibility of individuals with disabilities to programs and facilities;
- A detailed description of the methods that will be used to make the facilities accessible;
- Specification of a schedule for taking steps necessary to come into compliance; and
- Naming the official responsible for implementation of the plan.

Id.

One example of the importance of these self-evaluations is seen in the instruction provided to State and local transportation departments. The Federal Highway Administration teaches that an "ADA transition plan is intended to identify system needs and integrate them with the State's planning process." *Questions and Answers About ADA/Section 504*, *available at* http://www.fhwa.dot.gov/civilrights/ada_qa.htm.

Moreover, the DOJ's Technical Assistance Manuals explain to State and local governments how to put into practice the regulations. *Title II Technical Assistance Manual*, *available at* http://www.ada.gov/taman2.html [hereinafter "ADA Manual"]. Specifically, the ADA Manual gives extensive instruction on how public entities are to create and use transition plans. *Id.* § II-8.2000, Self-evaluation. The manual instructs that an entity "should be mindful that although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services." *Id.* This is exactly the harm that Title II of the ADA was intended to remedy.

And these instructions to State and local authorities from the Federal government's administrative bodies also recognize the importance of having transition plans in place, both to evaluate current efforts and to plan for future changes. Indeed, the ADA Manual notes that once a public entity identifies the areas of concern in its communities, "it should take *immediate* remedial action to eliminate the impediments to full and equivalent participation." *Id.* (emphasis added). Further, the manual points out that "[s]tructural modifications . . . should be made as expeditiously as possible, but no later than January 26, 1995" – now more than 15 years ago. *Id.* Thus the Tenth Circuit correctly held that the ADA grants to individuals private rights of action, allowing them to bring suit to compel public entities to establish such plans. *Chaffin*, 348 F.3d at 858. This is because the requirements of the regulations and "the type of discrimination prohibited [by them] fall[ ] squarely within the type prohibited by the ADA itself." *Id.* at 859.

That the regulations implement the ADA is clear. Indeed, the Ninth Circuit acknowledged as much, observing that "Section 35.150(d) was promulgated by the Attorney General pursuant to § 204 of the ADA . . . in order to implement § 202." *Lonberg*, 571 F.3d at

851 n.6. Yet, that court still illogically held that the regulations do not create a private right of action. It reached this decision in part because a public entity could be ADA compliant without having a transition plan in place, "in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." *Id.* at 851.

But the Ninth Circuit's concern was misplaced. Under the hypothetical situation where a public entity is already "fully compliant with § 202 without ever having drafted a transition plan," *id.*, meaningful access would have *already* been provided, so there would be no need for litigation and nothing to remedy.

The importance of creating and maintaining effective transition plans is again underscored by the Federal government's ADA Manual, which it developed to help State and local government programs and services comply with ADA requirements. Building on the four "minimum" required categories outlined in 28 C.F.R. § 35.150(d)(1), the manual contains an additional thirteen areas of "careful examination" that public entities should analyze in doing their self-evaluations. ADA Manual § II-8.2000, Self-evaluation. These thirteen areas are as follows:

1. Physical barriers to access.
2. Modification of policies where necessary to avoid exclusion, and justifications for exclusion where no modification will be made.

3. Effective means of communication "with individuals with impaired hearing or speech", such as through TDDs "or equally effective telecommunication systems."

4. "[R]eaders for individuals with visual impairments; interpreters or other alternative communication measures . . . for individuals with hearing impairments; and amanuenses for individuals with manual impairments."

5. Evacuation procedures from public facilities during an emergency.

6. Written and audio-visual materials to ensure that they are not offensive or demeaning.

7. Historic preservation programs to give priority to methods that provide physical access.

8. Proper and expeditious decision-making concerning not becoming ADA compliant due to a fundamental change in the nature of an activity or the imposition of an undue financial burden.

9. Access to public meetings for individuals with mobility impairments.

10. Non-discrimination in employment practices.

11. ADA-compliant construction requirements for new construction and alteration of existing facilities.

12. Proper training for public employees regarding full participation of individuals with disabilities.

13. Distinguishing between former and current drug users when setting policies denying participation in programs based on drug usage.

Id. If, as the Ninth Circuit determined, the ADA "says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access," *Lonberg*, 571 F.3d at 851, then why would the government have felt it necessary to issue such a thorough explanation of what the transition plan should entail? The answer is that the ADA *does* obligate public entities to produce such plans, and the regulations *do* create private rights of action for individuals to ensure that this obligation is carried out.

In explaining how a self-evaluation should be conducted, the ADA Manual further instructs public entities to examine their "policies and practices [as] reflected in [their] laws, ordinances, regulations, administrative manuals or guides, policy directives, and memoranda." *Id.* Moreover, it directs that public entities review practices that "may not be recorded and may be based on local custom." *Id.* The requirement that modifications relate to practices as well as written policies is especially important in ensuring that meaningful changes are made. Indeed, as this Court has noted, the ADA requires modifications necessary to ensure "meaningful access," *Southwestern*

Comty. College v. Davis, 442 U.S. 387, 410 (1979), which by its nature includes the ways the policies are actually implemented and not simply the words put down on paper by the public entities.

Also, the adoption of a transition plan allows members of the community, both individuals with disabilities and otherwise, to discuss what areas of improvement are most critical. Although there is no required public-comment period, entities "are strongly encouraged to consult with individuals with disabilities and organizations that represent them to assist in the self-evaluation process." ADA Manual § II-8.2000, Self-evaluation. When done properly, the public entity is able to evaluate what needs exist and set a plan to deal with them in an organized and efficient manner. Thus, an effective transition plan *must* have public input, and the public entities must first take the time and effort to put one in place for there to be anything to comment on.

The importance of having transition plans in place cannot be underestimated. As the Eleventh Circuit recently recognized in analyzing another of the ADA's enabling regulations, "New facilities constructed for use by public entities must be accessible, [28 C.F.R.] § 35.151(a); alterations of existing facilities must also be accessible, *id.* § 35.151(b)." *Harris* Slip Opinion at 26.

But what that court ignored, as did the First, Sixth, and Ninth Circuits, is that those buildings do not magically build themselves with the required accommodations. The ADA's enacting regulations are necessary to the effective implementation of the statute because they give public officials an opportunity to interact with the disability community in a way that they, in all likelihood, have never done before. This in turn educates the officials about the disability community and forces them to look at the entities' programs and facilities in ways that they never would have otherwise. Such interaction is at the heart of the ADA, helping public officials understand how members of the disability community function both physically and cognitively, and giving those officials the empathy that they need to implement the meaningful access that this Court has recognized the ADA was designed to bring about. *Davis*, 442 U.S. at 410.

It is extremely important that individuals be allowed to bring suit to compel public entities to establish and maintain the requisite transition plans. This Court should thus issue the writ, and bring the First, Sixth, and Ninth Circuits into conformity with the Tenth.

II. Mr. Skaff's Experience Both as a Public Official and as a Private Litigant Demonstrates the Importance of Forcing Public Entities to Establish and Maintain Self-Evaluation and Transition Plans.

Mr. Skaff has wide-ranging business and public sector experience, during which he has worked extensively to see that public entities become and remain compliant with the ADA's mandates. As noted above, his business experience began in the 1970s, followed by nearly 25 years of public service as an elected and appointed official. And all of that service came after Mr. Skaff suffered a fall that left him paralyzed from the waist down. This injury led him to focus his energies on creating environments that are accessible to people with disabilities, as a leader in both the public and private sectors.

In all of these capacities, and additionally as a private litigant suing public entities to enforce the ADA's requirements, Mr. Skaff has seen the necessity of establishing effective Self-Evaluation and Transition Plans. Having such a plan makes all the difference in ensuring that a public entity is able – and in fact does – create meaningful access.

A. Mr. Skaff's Experience Shows the Wisdom Behind the Regulations' Requirement that Transition Plans Must be in Place to Effectively Locate and Correct ADA Violations.

The proper implementation of a transition plan is critical for a public entity attempting to comply with the ADA's mandates. As noted above, an effective transition plan allows a public entity to protect itself from potential litigation by forcing it to take preemptive action to safeguard individual rights – something that can only happen if the public entity knows what buildings, programs, and facilities need to be updated and has taken the time to discuss those facilities with members of the disability community to establish a timeline for updating and repairing the most critical needs.

Indeed, while Mr. Skaff oversaw the process of developing San Francisco's Self-Evaluation and Transition Plan, the City learned of multiple properties and facilities that it previously had no record of. Had it not taken the time to perform a self-evaluation, the City never would have learned of those locations. It never would have determined whether those facilities were in compliance with the ADA's requirements, and if not, what needed to be done to reach full compliance. By completing its review, the City was able to insulate itself from litigation regarding those facilities by including them in the plan to update all of its buildings and programs.

On the other hand, Mr. Skaff has seen first-hand the problems that develop when a public entity fails to follow the transition-plan regulations. He has repeatedly encountered situations where both new construction and renovations have been built that, notwithstanding the statutes and regulations, did not comply with the ADA's mandates. As a result, he is not so naive as to believe that the mere existence of a requirement in a statute or regulation is enough to ensure that that requirement will necessarily be met. *C.f. Harris* Slip Opinion at 26.

For example, the California Department of Transportation ("Caltrans") recently updated the traffic and pedestrian signals on Lombard Street in San Francisco – an expansive combined high-volume highway and local roadway that runs through the City. The ADA requires that when any modifications of this nature are made, they must be accessible. *See id.* In this case, pedestrian signals were required to be accessible for all individuals, including blind pedestrians. But none of Caltrans' upgrades to Lombard Street met ADA requirements, the agency having failed to include audio warning signals for individuals with visual impairments.

When Mr. Skaff learned of the problem, he contacted the District Office serving the Bay area to ask why the job was not done properly. He was told that, if he had simply called the Office before the work had been completed, the agency would have gladly made the modifications correctly. But if Caltrans had taken the time to do a proper Self-Evaluation and Transition Plan with input from the disability community *prior to the start of this project*, the agency would have understood what was required and needed, and probably would have made the proper modification to begin with.

Instead, Caltrans did not have the necessary knowledge or policies in place to properly design this project, let alone the understanding that comes from interaction with the disability community that would have come from interaction with the disability community during development of a proper Self-Evaluation and Transition Plan. Thus, it created a signal situation at a number of intersections that blind pedestrians would find difficult – if not impossible – to navigate. The end result is that Caltrans will now have to engage in expensive remedial efforts, a cost that could and should have been avoided entirely had the agency simply developed and used a transition plan.

And had Caltrans officials taken the time to put together a valid transition plan, they would not have needed Mr. Skaff to call and inform them – after the renovation had been completed – that it had been done improperly. Unfortunately, this is not an isolated incident. But if individuals with disabilities are not allowed to enforce the Self-Evaluation-and-Transition-Plan requirements through a private right of action, it may become an increasingly more frequent occurrence.

The ADA's requirement that transitions plans be put in place is as much about encouraging – indeed mandating – interaction between public officials and the disability community as it is about making sure that buildings are constructed with the proper number of ramps. Until those officials are forced, by court order if necessary, to sit down and include the disability community in the planning process, incidents such as the upgrade of Lombard Street will continue. The ADA was meant to help individuals with disabilities be recognized and included by the general public. The Self-Evaluation and Transition Plan is the precise mechanism by which that is supposed to happen, and if public officials are not willing to engage in that interaction on their own, the only way to make it happen is to allow private litigants to enforce the requirement through litigation.

B. Without a Proper Transition Plan Already in Place, Individuals with Disabilities are Forced to Litigate ADA Violations on an After-the-Injury, Curb-by-Curb Basis.

In addition to his professional encounters with transition plans, Mr. Skaff has personally felt the effects of the Ninth Circuit's ruling that individuals are unable to enforce the ADA regulation's transition-plan requirement. For example, Mr. Skaff is currently in litigation with the town of Corte Madera over its multiple instances of non-compliance with ADA mandates. *Skaff v. City of Corte Madera*, Case No. 4:08-cv-05407 SBA (N.D. Cal.) (docket entries available on PACER). In his Complaint, Mr. Skaff described encountering various barriers to access throughout the City. He requested that Corte Madera "remove all such barriers to access for persons with disabilities," and further asked for an injunction ordering the City to establish and enforce a curb ramp schedule as part of its transition plan. *Skaff* Compl. ¶ 17 (Docket Entry No. 1).

The town moved for judgment on the pleadings under Rule 12(c), arguing that – just as in the instant case – Mr. Skaff has no private right of action to enforce the City's transition plan. The district court then granted that motion, relying in part on the

Ninth Circuit's decision in *Lonberg*. *Skaff* Order at 3-4 (Docket Entry No. 25).

As a result, Mr. Skaff's recovery is now limited to those particular curbs, sidewalks, ramps, and other barriers to access that he has already identified in his daily movements and in the litigation. To affect any other change throughout the City, he must shoulder the incredible burden as a wheelchair user to inspect *every curb ramp in the City* to determine whether they comply with the law. And then he must initiate new litigation related to each and every one of those non-conforming locations.

The inefficiency created by the Ninth Circuit's erroneous opinion is staggering. Corte Madera could simply comply with the Congressional mandate to create and enforce a Self-Evaluation and Transition Plan that methodically lists, prioritizes, budgets, and plans for the correction of *all* barriers to access in the City. Or, if it were located in the Tenth Circuit, Mr. Skaff could request that the district court order that the City create and enforce such a plan.

But after the Ninth Circuit's decision, Mr. Skaff and any individuals with disabilities who live, work, or visit Corte Madera must litigate ADA compliance on a curb-by-curb basis, one stretch of sidewalk at a time.

Every single time a person with a disability encounters a new barrier, that person has been deprived of the public access that Congress intended Title II to ensure. Contrary to the Ninth Circuit's conclusion, then, the lack of a transition plan does, *by itself*, deny a person with disabilities access to a public entity's services. Granting certiorari and reversing the Ninth Circuit's erroneous decision will not simply resolve a mature and important circuit split. It will also effectuate Congressional intent and give full meaning to Title II.

If the Ninth Circuit is correct, then responsibility for enforcement of the ADA is placed solely on the shoulders of the DOJ. In 1999, the Department engaged in Project Civic Access, whereby it took a small sampling of 100 cities throughout the country to spot-check those public entities for compliance with ADA mandates. *See Project Civic Access, available at* http://www.ada.gov/civicac.htm. One of those municipalities was San Rafael, a town only five miles from Mr. Skaff's home.

While investigating San Rafael, the Department discovered numerous violations of the ADA and learned that the City's transition plan and its implementation of it were inadequate. The DOJ then entered into a settlement agreement with the City, in which it required that San Rafael make various changes and improvements to its programs and facilities. *Settlement Agreement Between the United States of America and the City of San Rafael, California, Under the Americans with Disabilities Act, DJ# 204-11-272, available at* http://www.ada.gov/SanRafaelSA.htm.

But while Mr. Skaff welcomes such settlement agreements and hopes that more are forthcoming, it is ludicrous to believe that the DOJ will be able to complete inspection of every building, program, and facility in the millions of public entities throughout the nation. The reality is that meaningful access will only come about when individual plaintiffs are allowed to force the same types of settlement agreements with public entities on their own, without having to wait for the DOJ to appear at the doorstep of every offending municipality. In short, leaving enforcement of transition plans in the hands of the DOJ will only guarantee that individuals such as Mr. Skaff are never be able to receive the meaningful access that the ADA was designed to provide.

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CONCLUSION

In establishing the ADA's transition-plan requirements, Congress and the Attorney General intended that the regulations set a preemptive course to correcting ADA non-compliance in public entities. By failing to recognize this key facet of the legislation, the First, Sixth, and Ninth Circuits have put an incredible burden on the courts, the public entities, and most importantly, the individual litigants with disabilities who the law was intended to protect.

The Tenth Circuit reached the proper decision in determining that individuals have a private right of action to enforce the ADA's transition-plan requirements by requesting an injunction ordering public entities to establish transition plans.

For all of these reasons and those set forth in the petition, the Court should issue a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

ANDREW J. DHUEY
Attorney at Law
456 Boynton Avenue
Berkeley, CA 94707

CHARLES G. WENTWORTH
Counsel of Record
WENTWORTH LAW OFFICES P.C.
460 N. Main Street, Suite 204
Glen Ellyn, IL 60137
charles@wentworthlawoffices.com

Counsel for Amicus Curiae

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